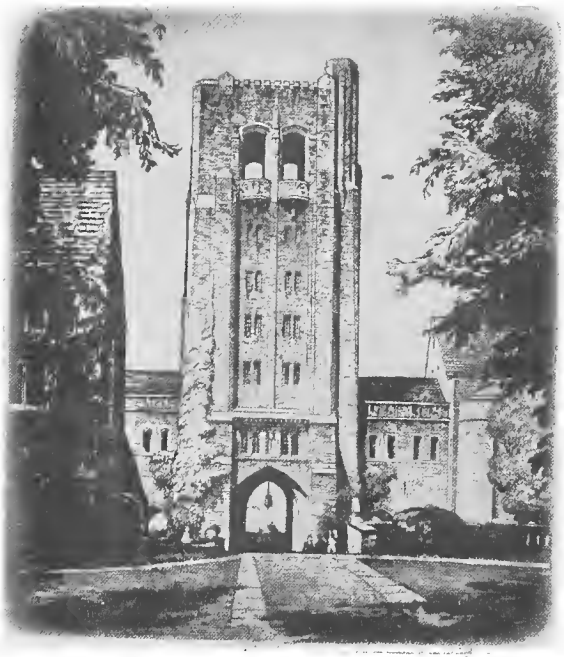

PRINCIPLES

OF THE

LAW OF REAL PROPERTY

FOR THE

USE OF STUDENTS

BY

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TO

HON. RICHARD S. TUTHILL,

ONE OF THE

JUDGES OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS,

THIS VOLUME IS INSCRIBED, AS A TRIBUTE

OF RESPECT, BY THE AUTHOR.

PREFACE.

The present volume is an outgrowth of the writer's own wants in practical educational work, and is offered as a course text-book on the subject of Real Property, as same is now included and grouped in the curricula of the standard American law schools.

While there are many excellent treatises upon the law of Real Property, yet, in the main, they are too comprehensive in scope and diffuse in detail for effective work in the class room. In this unpretentious compilation the writer has endeavored to condense and simplify the elementary rules and principles, and by a system of logical development to afford a clear perception of those abstruse phases of the subject that are usually found so perplexing to beginners. No attempt has been made to show the historical evolution of the law or to note the changes which same has undergone, other than incidental allusions, nor has the writer ventured, save in rare instances, to enter into any discussion of the matters involved or to present his own views with respect thereto. In all cases the principles, rules and definitions have been stated as tersely and concisely as circumstances would permit, the intention being that the text should serve only as the foundation or groundwork of lectures and exposition by the instructor.

Much that is undoubtedly germane to the subject has been intentionally omitted, for the reason that same can be more advantageously studied in connection with other branches of the course. Thus, many of the questions growing out of the relation of Vendor and Purchaser are a part of the elementary law of contracts, and should be covered in that course; and in like manner the course in Equity will include a number of the special topics that usually find a place in the ordinary treatise on Real Property. Continuity of design has in some places rendered necessary a passing allusion to these subjects, but as a rule they have been avoided.

While this book is primarily intended for the use of students pursuing a prescribed course under an instructor and to be employed in connection with other works of a like elementary character, it is yet believed that it will be found equally serviceable in private study. In its preparation free use has been made of the author's other legal writings, but the plan of the work and development of the subject are entirely new.

The favorable reception accorded to the first edition emboldens the author to hope that this revision may meet the approval of those interested in legal educational work.

G. W. W.

CHICAGO LAW SCHOOL, Jan. 4, 1900.

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OF THE

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PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

CHAPTER I.

PRELIMINARY VIEWS.

Introduction—Classification of Property—Derivation of Proprietary Right — Historical Development and Significance of Ancient Rules — Nature of Real Property — Exposition of Fundamental Concepts — Elements of Proprietary Right, Ownership, Possession, Enjoyment — Transfer of Proprietary Rights, Succession, Acquisition, and Acquisitive Methods.

Introduction.

Classification of Property.—In the common law, and those systems which are derived from it, the primary division of property is into *real* and *personal*, but this distinction, although it is now well established, is comparatively of very recent origin. By real property we mean *land*, or something so connected with land as virtually to be a part of it. On the other hand we class as personal property detached objects—those things which may be removed from one place to another or which, in the accepted phrase of definition, "follow the person of the owner." The classification is far from satisfactory to the scientific observer, and has been practically rejected by the modern speculative jurists, yet the terms have acquired such currency in the language of the law that it is extremely improbable that they will ever become displaced.

It may further be said that this classification exists only in the common law systems. In the civil (Roman) law, as

well as in those systems which have been founded upon it, there are no such fundamental differences between the law relating to land and the law relating to chattels as to necessitate a separate method of treatment for either. The comprehensive term "goods" (*biens*) in the law of Continental Europe seems to cover every species of property of a corporeal or tangible nature, nor would it now be necessary to distinguish between the two classes but for the abstractions of the medieval English lawyers.

A horse is quite as much the subject of proprietary right as a piece of land, and certainly it is quite as real, while the main questions of ownership in either case are not distinguishable in legal effect. But we have to deal with the law as we find it and to accept, for all practical purposes, the classifications which our predecessors have made and long usage has sanctioned. It may be said, however, that the terms "real" and "personal," when applied to the subject-matter of proprietary right, are merely arbitrary. At the present time they possess no internal significance but are simply "terms of art" which have gained currency through the operation of causes which have long ceased to exist. As a matter of fact much that we call "real" possesses no physical properties whatever and exists only ideally.

We shall have occasion to inquire into the evolution of the names as a part of our subsequent study of the rules which fix the character of real property, and we may therefore dispense with further consideration of the subject at this time.

Derivation of Proprietary right.— In its popular conception proprietary right is the immediate gift of the Creator; indeed Blackstone so asserts, [1] and succeeding writers, in many instances, have continued to reiterate the assertion. But this is an error. That only is a right which may be enforced by law, and the State is the source of all law. So with respect to property in land, the manner of its acquisition, the character of its enjoyment, and the methods of its disposal, we must look to the law alone, for rights of this

[1] 2 Black. Com. 3.

character are always regulated by and subject to the determinate rules prescribed by civil authority.[1] When we say that a right is vested in an individual we simply mean that he has the power to perform certain acts, or to possess certain things, according to the law of the land. In other words, so well expressed by Justice Marshall, "the law of property in its origin and operation is the offspring of the social state, and is not an incident of a state of nature."[2]

Derivation and character of the law. — The American law of real property is a composite structure the beginnings of which are lost in the dim mists which enshroud the early history of the Teutonic nations. It is the result of many successive accretions, extending over a long course of years, and has reached its present condition more through a series of historical accidents than through any process of natural development. It is founded upon, and in fact is but a continuation of, the customary, common and statutory law of England, modified by time and circumstance. But the practical result of this modification has been to create a system which, in many particulars, is wholly different from that of the country of its origin, necessitating for its intelligent study a restatement of fundamental principles adapted to the new environment, as well as an exposition of those matters which find no place in the old law but are the outgrowths of American political and legal policy.

The American land system, in many of its phases, is practically a new creation with no resemblance or analogy to anything which preceded it; in other particulars it is a return to early methods of the Anglo-Saxons, but in the main it is a modified continuation of English law. In the following pages an effort has been made to exhibit the law as it is; to point out the fundamental differences between the old law and that which at present obtains, and to emphasize those features of administrative policy which give distinctive character to the

[1] See Calder v. Bull, 3 Dall. (U. S.) 386; Ware v. Hilton, 3 Dall. (U. S.) 211.

[2] Ware v. Hilton, 3 Dall. (U. S.) 211.

acquisition, holding, and disposal of lands in the United States.

Historical development.—Notwithstanding that the law of real property has for its fundamentals immutable principles orderly arranged, yet its development has not been logical, nor can we reduce with scientific exactness its formula, maxims and rules, as may be done in so many other departments of jurisprudence. Indeed it has been said that, "not having been produced by deliberate legislation, nor yet by spontaneous growth of custom, it cannot be understood by itself;[1] that it has no intrinsic coherence, and no organic principles; and that being but a series of historical accidents, it becomes intelligible only in the light of its historical conditions."[2] While this characterization is not altogether inapt it is yet a little overdrawn. Organic principles it certainly possesses, somewhat obscured perhaps at times by the drift which the ages have cast upon them, but existing nevertheless and exerting a vital energy. But the rules—the technical details—maxims and formula, can only be properly understood when viewed in the light of history.

In the following pages in many instances, where the nature of the topic seemed to require it, a brief historical allusion has been made, sufficient in most cases to show the development. This is all that can be attempted in a work which purports to be no more than a primer. The author must assume that the student is familiar with the leading facts of English history, and it is upon this assumption that nothing has been said, save in an incidental way, of the origin, growth and influence of feudalism, and of its effect upon early land tenures. Should this part of the students' education have been neglected then before attempting to enter upon the succeeding chapters let him consult the pages of Hallam or Hume, and, if time and inclination permit, the

[1] And hence, however applicable the so-called "case system" of legal instruction may be to other branches of the law, it cannot be advantageously employed in the study of real property.

[2] See Pollock, Land Laws, 5.

works of some of the later writers on English constitutional history.[1]

Blackstone's "Commentaries," once the first book placed in the hands of students, is no longer regarded by many educators as a desirable initiatory work, and it has been eliminated from the texts used in a majority of the schools. The author suggests that its perusal, and it certainly should be read at some period of undergraduate study, be deferred until after a fair understanding has been obtained of the present condition of the law.[2] It may then be read with much advantage, particularly with respect to legal history.

A knowledge of American constitutional and political history is a desirable adjunct of every legal education, and in the study of our law of real property will be found eminently useful. It does not play the same important part as English history but it enables the student to obtain better and clearer views of our land system and the adaptation of the old law to the changed conditions of our people.

Significance of Ancient Rules. — At an early period in his studies the student cannot fail to observe that in the law of

[1] The author suggests the following as a brief but accessible list of historical authorities for preliminary or collateral reading: Robertson's "Introduction to the History of Charles the Fifth" (Vol. 1), an excellent summary of the progress of society in Europe from the subversion of the Roman Empire to the beginning of the 16th century; Guizot's "History of Civilization," Lecture IV, showin the effect of Feudalism on society and its influence as a factor in civilization; Hume's "History of England," Vol. I, Appendices I and II; the former is a sketch of Anglo-Saxon government and customs, the latter of Feudal and Anglo-Norman government and customs; Creasy on the "English Constitution," a brief but well written history; Enc. Brit. (9th ed.), Art. "Feudalism." The general perusal of the following can be made with profit: Hume's England, Vols. I and II; Green's England, Vols. I–III; Hallam's Middle Ages, and Constitutional History of England. The abridged editions of the latter, prepared for the use of students, will be found particularly serviceable.

[2] Much of the law which Blackstone describes was practically obsolete at the time he wrote (1758) while many of the important topics of the present day have been developed since his death.

real property there is much that is apparently arbitrary, technical, and artificial; that unlike the rules which apply to persons, or obtain in the regulation of commerce, which are changed and varied to suit the exigencies of the times, the law relating to land is founded on old rules and formulas which in many instances have outlived the reasons which induced their creation; that words and phrases from which the original meaning has long departed are still employed, and that many of the essential features of our land laws are based upon the obsolete systems of former years.

But the student has just been told that the law of real property is an historical, not a logical, development, and keeping this in view we may readily account for the presence of much that otherwise might seem meaningless and anomalous. America is only greater England and the laws of that nation once rested upon the people and institutions of this country with the same force as in the motherland. While it can be said that the feudal system never obtained an appreciable foothold in the American colonies, yet the common law, which developed while that system was in operation, became and remains the basis of American jurisprudence. All of the lands in England were held by a feudal tenure; the principles, rules and technical terms of feudalism pervaded the entire law of real property, and when proprietary rights were asserted in the soil of America and grants of same were made, the existing law was resorted to for the purpose of measuring the quantity and determining the quality of the estates thus created or transferred. Thus a rule of property was established which fixed the rights of the contracting parties at the time and, of necessity, their successors in the times that were to come. It is true that the changed conditions of the colonists, living under circumstances unknown in England, affected in some measure their relations to the soil and the rights which they acquired therein, yet there was no necessity for a new system of law, or for new maxims, terms or phrases, and none were framed.

During the colonial period there was but little deviation from the law as it prevailed in the mother country. Upon

the assumption of independence and sovereignty the old law, modified to meet new conditions, continued to be administered. Property rights had become established under it, and such rights were transmitted with special reference to it. Terms which had acquired a definite meaning were retained to designate those matters which took the place of and most nearly resembled their English prototypes, and so the old names became associated with new faces. Thus, the term "fee" which under the feudal system represented the highest form of estate in land that could be held by the subject, continued under our allodial system to represent the highest estate vested in the citizen, notwithstanding there were vital differences between them. And so it was with many other features of the old law.

But these old rules and terms have been well described as "land marks of the law" to remove which, at this time, would only entail confusion. They have acquired well defined significations; their long and uniform use now tends to certainty and precision, indispensable requisites to the stability of land titles, and under their application the property rights of millions of our people have been fixed. Hence, their certainty and permanence is of vastly more consequence now than is their consistency with any given theory or even with reason, and while it is competent for the legislature to change, modify or abrogate them, and while to some extent this has been done, yet the experience of all ages goes to show that tampering with the rules of property is generally of doubtful expediency and often productive of most mischievous effects.

Nature of Real Property.

Rights and Things.—In the chapters which follow the writer has endeavored to state only the practical rules which govern the creation, extinction and transfer of legal relations in respect to land. The limits of the work preclude any considerable inquiry into the reasons which underlie the rules or discussions of their philosophical character. Yet he who

would know the law as a science, and not as a mere operative art, must extend his studies beyond the narrow formula of the codes or the routine work of the practitioner; in other words, he must understand the *principles*[1] involved in the various relations which are regulated by legal *rules*, as well as the rules which regulate those relations.

While the law of real property, more than any other branch of juristic science, is hedged with an almost infinite variety of technical and apparently arbitrary rules, its basic principles are yet laid in legal reason, and the fundamental ideas upon which it rests are comparatively few and simple. Before entering upon the study of the technical details of our subject we may with profit pause to consider its general form and structure and briefly glance at the salient features which such a survey may present.

In the contemplation of law, *rights*[2] of property are predicated upon what we may call *things;*[3] and for the purpose

[1] A *principle* is a first idea which is made the beginning or basis of a system of reasonings. To illustrate by a sensible image, it is a fixed point to which the first link of a chain is attached. Such a principle must be clearly evident; to illustrate and explain it must secure its acknowledgment. Such are the axioms of mathematics; they are not proved directly; it is enough to show that they can not be rejected without falling into absurdities. Bentham, Theory of Legislation, c. 1.

[2] It is difficult to find a concise definition for *right* without invading the domain of the speculative jurists, or, as they are generally called, the philosophers. Mr. Justice Holmes gives the following lucid definition: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force;" Holmes' Common Law, 214. Mr. Holland defines a "legal right" as "a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others," and further says, "that which gives validity to a legal right is, in every case, the force which is lent to it by the State. Anything else may be the occasion, but is not the cause, of its obligatory character." Elements of Jurisprudence, 72.

[3] A *thing* is the object of a right. This artificial use of the term "thing" is not peculiar to legal science, but was in fact borrowed by it from speculative philosophy. Holland, Jur. 87. The term is constantly employed in the Roman law. There is no definition

of the creation or termination of such rights it is immaterial whether the objects to which they attach are tangible or intangible. Thus the subject matter of the right may be a piece of land, or it may be a mere privilege to be exercised in respect of the land, but in either case the law regards it as a *thing*. The relation which a *person*[1] sustains to a *thing* is the basis of the law of real property. The *person* exercises certain proprietary *rights*,[2] in, over, or concerning the *thing;* in other words he possesses some degree of interest in it, and the creation, protection, and determination of this interest forms the body of the law. Again, the *person* can exercise *rights* in the *thing* only by virtue of some legal *authority*—some enabling power. It is with these three fundamental concepts that the entire law of real property has to deal.

Practical Example.—Let us endeavor to simplify these abstract propositions by a concrete illustration, and imagine we are standing upon an eminence which overlooks the broad acres of a farm located in the State of Illinois and upon the shore of Lake Michigan. Before us lies the cultivated fields, meadows and woodlands of the farm; beyond these is a stretch of sandy beach and finally the blue waters of the lake. Through the farm wanders a brook, which as it approaches the lake, widens and deepens into a navigable channel. Across the land runs a highway, and along one of

of things (*res*), however, in the *corpus juris*. It is thought that originally the word *res*, like its modern equivalents, denoted material objects and nothing more; but as in common parlance it was extended to mean, indefinitely, whatever can be the object of thought, so in juridical language it was extended to include whatever could be the object of a legal transaction. Lindley's Jur. p. lxxxviii.

[1] A *person* is the subject of a right or duty, irrespectively of the subject being, as is more frequently the case, or not being, a human individual. Holland, Jur. 89.

[2] The speculative jurists divide rights into two classes, viz., *in rem* and *in personam*. The former are called rights of *ownership*, the latter rights of *obligation*. Proprietary rights fall within the first division and signify generally a lawful appropriation of the thing which forms the object of the right.

its sides is laid a railway. To the eye of either lawyer or layman the landscape is the same, but even the physical aspects are fraught with different meanings when seen from the technical or non-technical point of view. The land, the water, the right of way of the railway, are all subjects of property; they constitute the *corpus*—the body, to which proprietary rights attach. The first, is tangible, possessing substance and permanence; the second also possesses a sort of substance but it is ellusive, transitory and temporary; the third is wholly intangible, consisting merely of a privilege—a collection of rights—held by the railway company, with no interest in the soil. In law these are all *things*.

Now let A represent the proprietor of this farm, which, we will say, contains several hundreds of acres. The land nearest to us has upon it the residence and farm buildings of the proprietor, and comprises a tract of forty acres. This land he acquired through inheritance from his deceased father, who occupied it before him. His property rights in this part of the farm are practically absolute; he may use or abuse the land in any way he sees fit and, if he so desires, he may sell it. In fact he has partially exercised this last right by placing a mortgage upon it to secure the payment of moneys he had theretofore borrowed. By this act his right to sell is not impaired, but the land, either in his own hands or those of a purchaser, will be incumbered by the lien created by the mortgage.

Immediately adjoining the above mentioned lands is a tract of eighty acres. This also belongs to A, having been "left" to him by the last will of his deceased grandfather. But while he is the *owner* of the land he is not in the *possession* of same, for by the terms of his grandfather's will the use of this tract was given to A's cousin, B, for her life.

The meadow lot of eighty acres on which A's cattle graze, although a part of the farm, does not belong to A but to his cousin C, who obtained it also by gift from their grandfather. But while A is not the *owner* he is yet in the lawful *possession* of the land, having leased it from C for a long term of years.

The lands along the lake shore are owned by A and are held by him in virtue of a purchase from the former owner, which is evidenced by the latter's deed of conveyance. The wide sandy beach between the upland and the water is also A's land, but this he acquired not by gift or grant from any person but through the operations of nature. The beach has been a number of years in forming and each year the winds and the waves have imperceptibly added a little soil in the constant wash of the water.

The wood-lot of eighty acres was a part of the grandfather's estate. It is occupied so far as it is capable of beneficial occupation, by A; that is, he cuts fuel from it and his herds roam through it. But this lot was left to A, B, and C jointly and they together own it, and while A is ostensibly in exclusive possession yet the law regards his possession as that of his co-owners as well.

That portion of the farm traversed by the highway belongs to A. So does the land covered by the highway, although the general public are free to use it at all times for purposes of public travel. The public acquired this right through the free gift of A. That is he gave to the public the right of travel over a strip three rods wide. But he gave no more; the land remains his, as it was before, and he may still use it for any purpose not inconsistent with his gift, but at present it is subjected to a public servitude and this will cling to it as long as the public necessities require. The land used by the railway is in a somewhat similar condition. It still belongs to A. but it is impressed with a burden of use by the railway company. Nor did the company acquire this right of way by the gift of A as was the case of the public in the matter of the highway. On the contrary, although the law regards both ways as devoted to public uses, A was unwilling that the railroad should be constructed hence the State, in the exercise of its sovereign powers, took the land without his consent but with a compensation to him for its use.

The portion through which the stream meanders also belongs to A, and he uses, as he has a right to do, the waters

which flow through its channel. But all that he can get from the stream is the use of the water as it flows through his land. We say the stream is his, and this is true, but he has no deed for this species of property and it belongs to him only because the adjacent and subjacent soil belongs to him. The water he may not unreasonably detain, nor can he stop its course, nor can he unreasonably divert it, and where the stream widens to a navigable river he must further yield his proprietary rights to the paramount rights of the public to use same as a highway.

Returning now to our former discussion we may illustrate our theories by applying them to the example. The student will experience no difficulty in regarding the house of A as a thing; it has substance, body, form; it appeals to the senses. Nor will there be any difficulty in adjusting our ideas of a thing to an aggregate of tangible and material objects, like the soil, houses, trees, and herbage, or even to the running water, unsubstantial as it may seem, and these aggregates may be regarded as a single thing for the purpose of convenient treatment. But physical qualities are in no way essential to the legal existence of a thing. Indeed the law does not concern itself in any way with material objects except as they may be the subject of rights, and whatever may be the subject-matter of a right, that the law will recognize as a thing. Now in our illustration we saw the railway company in the enjoyment of a privilege of passing and repassing over A's land. The land is a thing; that proposition requires no demonstration. But so also is the privilege, notwithstanding that it is wholly intangible. The copyright of this book is quite as much a thing as the bound volume, the one is tangible the other intangible, but both are regarded in law as having distinct and measurable values, and whatever has value is a thing, regardless of body or physical substance.[1]

Legal Nomenclature and Classification.—Now let us begin to use legal terminology, for in practice we shall not em-

[1] Pollock, Jur. 124; Holland, Jur. 182.

ploy the simple words, "things," "rights," etc., except as colloquialisms. Hereafter when we shall have occasion to allude to a thing in a comprehensive way we shall speak of it as a *tenement;*[1] that is, as something held, for in contemplation of law the landowner simply *holds* the thing, either for a time certain or for an indeterminate period.

In the example it will be perceived that A's proprietary rights are not the same in all parts of the farm. Thus, in the part which contains his house he has an almost unlimited sway and may do with it as he pleases; in the parts devoted to the highway and railroad, his rights are in large measure subservient to the rights of others; in the part leased from C he has a comparatively wide latitude with respect to use but his rights are limited in point of time, that is, they will expire with the termination of his lease: in the part occupied by B he has practically no present rights of use, his enjoyment of the land being postponed until B's death. Here then, is a variety of degrees of specific interest held by A, depending upon certain *acts*[2] and *events*,[3] for their duration, character, and qualities. These interests the law has included in the generic term *estate*, and it is the estate and not the land

[1] The term *hereditament* is also employed in the same way.

[2] Every right originates or becomes effective through the happening of some act or event, or series of acts or events, and is varied or terminated by the same agencies. Acts and events are said to be *investitive* where the result is to create or confer a right, and *divestitive*, where the result is to abridge or destroy a right.

Acts, in the widest sense of the term, are movements of the will. Jurisprudence is concerned only with *outward acts*, or those determinations of the will which produce an effect upon the world of sense.

[3] *Events* may be movements of external nature, or acts of a human being other than the one whose rights or duties are under consideration. These definitions and distinctions may seem to the student a trifle subtle and metaphysical at this time but as he progresses in the study their relevancy and application will become apparent. Should the student desire to pursue these matters further he may consult Austin's Jurisprudence, Vol. II; Holland's Jurisprudence; Holmes' Common Law. The theories of Mr. Austin, while displaying great thought and learning, are rather fanciful however, and by no means to be accepted as postulates of legal science.

which is really bought, sold and conveyed. Hence, when we say that certain parts of A's land were left to him by his grandfather, what we actually mean is that certain rights in the lands were left to him; in other words, an *estate.*

It will be further seen that A assumes to exercise dominion over his house lot in virtue of the prior rights of his father, the former owner, which he acquired by inheritance; that ownership in the land occupied by B accrued through rights of his grandfather, transmitted by last will; that the meadow lot he holds by virtue of C's lease to him; that the shore land he holds because of his deed from the prior owner, and that the sandy beach is held under certain provisions of law without a grant of any kind. In each instance, however, his proprietary rights are founded upon and are referable to, some kind of *authority* proceeding from or dependent on the methods of their *acquisition*, and the terms of the authority measure and define the rights. This, in law, is technically known as *title.*[1]

Having thus hastily and imperfectly reviewed the primary elements of real property we may summarize the result as follows:

1. A thing considered as the object of rights. The land or *tenement.*

2. A right, or collection of rights, exercisable with respect of the thing. The *estate.*

3. An authority for the exercise of the right with respect of the thing. The *title.*

The entire body of the law with its almost infinite variety of rules is based upon these three simple postulates. In the three chapters next succeeding these elements will be considered in the order above given and the nature and character-

[1] By many writers title is taken to mean simply a mode of acquisition. In its practical phases this is all that is seen and to the merely operative lawyer it presents perhaps no other significance. Thus we speak of title by deed, or by will, or by descent, referring in each case to the method of acquisition. But the essential element is *authority,* and if this be wanting the title fails, however it may have been acquired.

istics of each will be fully defined and explained. The remaining chapters will be devoted to an exposition of the practical methods by which estates are created, conveyed, and terminated.

Elements of Proprietary Right.

Ownership.—In our example the student will not fail to have observed a basic idea which pervaded every part and colored every phase, and this idea or notion, may be crystalized into the word *ownership*. The expression is convenient; it represents the ideas involved in the sum of the aggregations of rights which may be had in land better than any other word that can be used, yet it is merely an abstraction. It eludes exact and scientific definition, and legal lexicographers admit their inability to fix its precise status.[1] It has been described by one writer as "the relation of a person to a thing,"[2] by another as "a plenary control over an object,"[3] by another as "the entirety of the powers of use and disposal allowed by law,"[4] and by still another as "a right over a determinate thing, indefinite in point of use, unrestricted in point of disposition, and unlimited in point of duration."[5] Perhaps the best definition is that which describes it as "a power residing in the land owner as its subject exercised over the land, as its object, and available against all other men."[6] None of these descriptions are altogether satisfactory, particularly when applied to the ownership of land, and we are compelled to seek a definition rather in the enumeration of its attributes than in the term itself.

But in spite of our inability to strictly define the term it yet definitely represents fixed ideas of property. It implies powers of use and disposal; it carries with it the idea of pos-

[1] The code commission of New York has declared that "the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others" (N. Y. Civ. Code § 159), but like every attempt to codify a principle the definition is of no value for juristic purposes.

[2] Markby, El. of Law, 158.

[3] Holland, El. of Jur. 180.

[4] Pollock, El. of Jur. 166.

[5] 2 Austin, Jur. 477.

[6] Holland, El. of Jur. 72.

session; it indicates rights of enjoyment, and further indicates that all of these rights are exclusive of corresponding rights in others. But the power of user may be qualified in many ways; the power of disposal may be limited; one may be the owner and yet not entitled to possession; and the rights of enjoyment may be abridged or suspended. Thus, in our example A was in the full exercise of all his proprietary rights in the parcel first described and all of the ideas involved in ownership were there illustrated. While he was the owner of the second parcel his proprietary rights were curtailed and in some respects subservient to those of B and while he was not the owner of the parcel held by C he yet was exercising practically all of the beneficial rights of ownership in the land. But in this latter case A's possession and enjoyment was directly dependent on C's ownership and it was by virtue of the authority emanating from that ownership that A was enabled to assert and maintain his possession.

The phases involved in the second parcel are those which seem the most perplexing to the student. It will be remembered that this tract was given to A but at the same time the use of same for her lifetime was also given to B. Now here we have apparently two ownerships in the same land existing at one and the same time. At first this seems anomalous, and under any other system of law than our own probably would be. We could readily understand how there might be successive owners, the property passing from one to another by reason of certain events, and hence, how B might be the present owner and that after her death A would become invested with title. As we have seen, however, ownership is not applied to the land but to the aggregate of rights that may be had therein—in other words to the *estate*. In the example A has an estate in perpetuity and from this estate there has been "carved," or taken out, by the grantor of same a lesser estate for the life of B and given to her. But B's lesser estate is regarded only as a part of the greater from which it was taken. B is therefore the owner of this inferior interest and A is the owner of the residue. Both of

their interests constitute in law but one entire estate. If we were dealing directly with the land this would be impossible but by separating the ownership from the land, and attaching it to this imaginary quantity which we call the estate, we find no difficulty in creating a number of actual and distinct ownerships which may exist at the same time. In the pages which follow the technical rules which regulate these ownerships are stated and discussed and we may dismiss this branch of our subject at this time by drawing the following postulate; *ownership* is the fundamental right by which all other rights are made effective, and the law of real property is the systematic recognition and regulation of this right, and of those which flow from or are dependent upon it.

Possession.—From the same example we may gather another idea which finds expression in the term *possession.* This also is a legal abstraction, in no way dependent on physical conditions, control or detention, notwithstanding that we are accustomed to associate it with some one or all of these phases. Possession is generally regarded as an attribute of ownership—in fact that it is inherent in ownership.[1] We have seen, however, that a person may be the owner and yet not be entitled to possession, while, on the other hand, a person may be in possession who is not the owner. This enables us to draw a strong line of demarcation between ownership and possession, although the two are often confounded.

But if we refer to our postulate in the last paragraph and accept the statement that ownership is the fundamental right which gives effect to all others, then possession, and by this is meant the legal right of possession, must rely for its support upon an ownership of some sort, even though slight, qualified or temporary.

As previously remarked possession is in no way dependent on physical conditions; that is, the owner is not required to come into physical contact with the soil. He may be lawfully in possession of land which is vacant, or is situated in

[1] Holland, Jur. 181.

a distant locality, or which he has never seen. This was not always the rule for in an earlier and ruder age much stress was laid on actual physical tradition and occupation. But at present, and in America, the essence of possession lies in the right, coupled with the ability, to assume physical control at the pleasure of the owner.

We cannot, however, utterly exclude physical detention from our view for it may be that while the owner holds in its entirety the right of possession an intruder is in the actual occupation of the land. Such intrusive possession, though without sanction of right, may yet be sufficient to invoke the protection of the law should the owner attempt to expel the occupant by force and arms; and whatever may be the physical relations of the parties to the land, the law will award the possession to him who shall show the best right, even though its effect may be to deprive the lawful owner.[1]

Nor can the physical element of possession be entirely eliminated from our contemplation of the subject, however much it may be viewed as an abstraction. In its early significance possession expressed the simple idea of physical capacity to hold an object to the exclusion of others. This idea has never been abandoned by the law but in the progress of legal science the term has lost some of its earlier meaning; a distinction came to be made between a simple physical condition which is protected by ownership and the abstract right of possession. When this had been accomplished it was an easy matter to separate the right of possession from the right of ownership, and to permit these rights to be held by different persons. This is the condition of the law at this time and these phases of the subject will find frequent illustration in our subsequent studies. The distinction is shown in our example where A is in possession of the land of C under a lease. Here the right of possession was segregated from the right of ownership and given to A, who entered and occupied the land. But just here is involved

[1] As where a tenant is in possession under an unexpired lease and the landlord attempts to oust him.

another of the perplexing features of legal possession. A is in the actual occupancy of the land and in such occupancy we recognize both physical detention and the abstract legal right, for he has both. Now possession, unlike ownership as we have seen it in the legal fiction of estates, indicates an exclusion of similar rights in others; in other words only one person can be in possession of the same thing at the same time.[1] But the law has so inseparably interwoven the principles of ownership and possession that notwithstanding C, in our example, has apparently transferred his possessory rights to A, yet for certain purposes this right is regarded as still inhering in C's ownership. This creates what seems to be, and in fact really is, an inconsistency. But the lawyers have found a way to reconcile this inconsistency by making two kinds of possession, one of which is called *actual* and one *constructive*. In our example A is in the actual possession, or the possession in fact, but C, being the owner is still held to have a fictitious or constructive possession, or what we might call a possession in law. This is done for the purpose of protecting the interest of the owner against encroachments by persons asserting an adverse possession.

As we have seen, possession, in a legal sense, is distinguished from mere physical control or detention, and hence does not require for its support a material or corporeal object. A person, therefore, may be in the lawful possession of a right, advantage, privilege, or other intangible matter which the law regards as a thing; as, one may be possessed of a right of way, like the railway company in the example, although possessing no rights in the soil. This too, seems a trifle confusing to the student who is accustomed to associate ideas of possession with objects capable of physical control. But let us again leave the subject of land for an illustration. We experience no difficulty in applying ideas of ownership when we say a man is possessed of a good reputation, yet what could be more intangible. Still the law will protect

[1] Markby, El. Law, 203; Pollock & Wright on Pos. 20.

reputation as a valuable propreitary right, and so, in like manner, we say a man is possessed of any of the intangible rights of property which the law will recognize as a subject of value.

Enjoyment.—There is still another idea involved in our example which is quite adequately expressed in the word *enjoyment*. This also is an attribute of ownership and is inseparably connected with possession, yet it represents ideas which neither of those terms fully cover. A grant is made to a party of lands which he is to "have (own), possess, and enjoy," and these three terms seem to express in all its fullness the sum of the aggregate of proprietary rights.

The right of enjoyment is coincident with the right of possession. It implies all of those things which accompany or form a part of what we call user; that is, an unimpeded occupation; the acquisition of the fruits or increase of the land; the privilege of the air upon it, of the light which comes across it, of the water which flows through it; the right to build upon the land, to excavate beneath it, and generally to do with it whatever fancy or caprice may suggest. At first this looks like possession but upon examination we shall find many distinguishing features. The occupant of land can in no just sense of the term be said to be possessed of the air, or the light, which comes upon his land, nor of the water which flows through it notwithstanding he may for a time actually detain it, but he may receive whatever benefits these matters confer—in other words he may *enjoy* them, and this enjoyment is part of his proprietary right. It is true that this distinction may seem subtle and it may be said that a man is possessed of one sort of a right quite as much as of another but it is a distinction which the law has long drawn and the term is a most convenient and compendious expression in actual practice. Nor is there anything incongruous in the distinction; we are using it constantly, in our daily intercourse and business relations with men, to express exactly the same ideas as are involved in its application to land. Thus, we do not say a lawyer is possessed of a lucrative practice for the word in such a connection does not

properly indicate our meaning, but we say he enjoys, or is in the enjoyment of, a lucrative practice, and so, in like manner, we speak of some of the land-holders' relations to the land. Therefore, it will be seen that there may be an interference with a man's proprietary rights without an actual invasion of his possession, and that, upon the other hand, a man may by his own act diminish his rights of enjoyment without a surrender of possession. We shall find many examples of this in our subsequent studies.

But the right of enjoyment is not absolute. It may be curtailed by the terms of the grant, by the equal rights of others similarly situated, or by the paramount right of the State in the furtherance of public policy.

In our example A had a right to use the waters of the brook which flowed through his land; that was a part of the enjoyment of the property, but he would have no right to use such waters to the injury of the land owners above him, for they possessed the same right, nor could they by pollution or diversion interfere with his rights. So too, A had a right to enjoy the land he had leased from C but not in such a way as to permanently injure the value of the property; that is, he might not cut down the trees, though he could take their fruits. But on his own land he might do practically anything which did not interfere with the enjoyment of their land by his neighbors. Yet even on his own land his rights of enjoyment would be subject to some restrictions arising from public policy. It is out of this principle that we get the prolific doctrine of nuisances.

Again the right of enjoyment may be diminished by the voluntary acts of the owner or through the exercise of those superior rights of property which in contemplation of law are inherent in the State. Thus, in our example, while A is the owner of the soil of the highway the general public have the paramount right of enjoyment for the purposes of passing and repassing, and this from the act of A in giving the use of the soil for this purpose. In like manner his right of enjoyment of the land comprised in the railroad right of way

is very seriously diminished, not through any act of his but by reason of the compulsory taking by the State.

Thus it will be seen that while possession and enjoyment are inherent qualities of ownership they may both be segregated or detached and given to others and in this way leave only a naked proprietary right, but however numerous and extensive may be the detached rights, and however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner.[1]

The foregoing paragraphs are not intended as a critical analysis of the comprehensive terms, Persons, Rights and Things, nor of the elementary constituents of Proprietary Right. For an extended discussion of these matters the student must consult a treatise on jurisprudence; but in any statement of the rules of private substantive law the ideas which they suggest are always present. Hence it is of the utmost importance that we obtain clear and correct views of the abstract principles involved before entering upon a study of technical details.

Transfer of Proprietary Rights.

Succession.—In our example we saw that A, with respect to a portion of the farm, is clothed with full and complete ownership; that with respect to other parts, while he is the owner, he is shorn of some of the essential attributes of ownership; and that, as to still other parts, while he is not the owner, he is yet in the full enjoyment and beneficial use of the land. From these facts we may fairly draw the following deductions: (1) that proprietary rights may be separated; (2) that they may be exercised in part by different persons at one time; (3) that they may be exercised in entirety by one person at different times, and from these deductions it would seem that they may be transferred, either in whole or in part, from one person to another.

But a person cannot possess a right as he would a chattel, for a right is a mere abstraction. Neither can he deliver it

[1] Markby, El. Law, 158.

to another like a piece of merchandise. Clearly, then, we must not look to see a right transferred in the same manner as in the case of corporeal objects, or of such as admit of an actual manucaption. Indeed there is no transfer at all, strictly speaking, the law regarding the result of a conveyance of land more as a substitution than a transfer. The legal theory is, that where one gives up to another the possession and profits of a thing the latter immediately assumes and occupies the position which the former previously held. This involves an idea which is quite fairly represented by the word *succession*. Thus, in our example, A succeeded to, or became invested with, the rights which had theretofore been held and exercised by prior owners, through channels which the law has recognized and sanctioned. This looks like a transfer, and we ordinarily would speak of it as such, but it is not a transfer in the proper meaning of the term, for both the land and the rights which are predicated upon it remain as they were; there has simply been a novation of parties—a substitution of A for those who immediately preceded him, and where a substitution is made in conformity to legal rules then all that relates to the land ceases to apply to the former owner and at once becomes effective for the present owner. Every owner occupies, with respect of his land, what has been quite happily described as a situation of fact;[1] this is a continuing quantity, and whoever occupies it has the rights attached to it. One occupant may put another in his place, who will then sustain to the land the same relations as the former occupant. But in such event there has been no transfer—no setting over, of rights, in the proper sense, although we are accustomed to so regard and to so speak of the transaction, and notwithstanding that for practical purposes such is its effect. At best, however, it is no more than the transfer of a legal relation.

It will also be remembered that part of the farm was "left" to A by his father, who owned the same in his lifetime, and that part was acquired by purchase from a former

[1] Holmes Common Law, 340.

proprietor. From this we find that a succession may accrue in two ways; (1) during the lifetime of the former owner or, to use the technical phrase, *inter vivos*, and (2) upon the death of such owner. Out of this classification we derive the vast mass of technical rules and terms of art which find practical expression in what is known as *conveyancing*.

Acquisition.—It now remains only to speak of the methods whereby one person succeeds to the position held by another. We have seen that A holds by virtue of his inheritance from his father; by his grandfather's will; his cousin's lease; his grantor's deed, etc., thus indicating that there is a variety of methods whereby a person may become invested with proprietary rights. These matters, it will be remembered, constitute A's title to his lands. It is through these acquisitive methods that he derives his authority and upon them he relies for protection in case of any invasion of his rights by third parties, and it is in the framing and construction of these matters that the principles we have been considering in the preceding paragraphs find a practical application.

There is no difference in principle between a succession to the estate of a living person and of one deceased, but from motives of convenience and expediency the law has made some marked distinctions with respect to the several methods of acquisition. These are the outgrowths of time and experience and to some extent the result of accident. We shall discuss all of these matters in their technical relations later on but for the present let us confine ourselves to the elementary phases of the subject. First then, as respects conveyances between living persons. We have seen that A acquired a portion of his land from a former owner by deed. That is he purchased from another the land in question, and, for some adequate consideration, that other agreed to surrender and did, in fact, surrender to A the possession and profits thereof. This was the entire transaction, and in it the student will perceive the essential elements of a completed contract. But it has been said that A holds his lands by virtue of a deed. This, however, is only partially true. He holds in reality by virtue of the executed contract of sale; it

is this which measures his rights and this alone. Therefore we must distinguish between a sale and the *evidence* of a sale. To promote certainty in matters of this kind the law now says, but did not always so say, that if the parties desire to preserve the proofs of a sale they must cause a brief history or account of the transaction to be made in writing. To this document reference may afterwards be had to decide any disputes that may arise. This is the *deed* of the parties.

The delivery of a deed between living persons is easily understood, because it simply represents the consummation of an oral contract, but the principles involved in a will are more difficult. We have said that a portion of A's farm was left to him by the will of his deceased grandfather. The popular understanding of this is that the gift of the property was made after death. But this involves an absurdity as does also the very prevalent belief that the will—the written paper, is a dead man's expression of desire. A gift by will, equally with a gift by deed, is a transaction between living persons, the distinction being that in the one case the gift takes effect presently while in the other it takes effect upon the death of the donor. Nor is the written paper called a will any more a gift than the written deed—both are but evidences of the gift. In both of the transactions we have been considering, deeds and wills, there is an apparent transfer, a setting over, as it were, from one to another. The idea of a succession is not very fully presented, although the principle is always there, and the transaction more nearly corresponds to the legal conception of an *assignment*. For all practical purposes then, we may class dispositions of this character as assignments and the persons acquiring proprietary rights under them are called *assigns*.

But there is still another form of succession which fully meets our idea of the term. This occurs also by the event of death and in the technical language of the books is called *descent*. Thus, in our example we say that A acquired title to his house lot by inheritance. In other words, that A's father having died without making a will, his land descended to his son. It is a common expression among both lawyers

and laymen, that the land of an intestate, that is, of a person who dies without a will, "descends" to what are known as his *heirs*, or persons whom the law names to take the property. But this is only a "term of art;" the land does not *descend* but the heirs do *succeed* to the rights which the deceased may have had in the land. This is accomplished to some extent by a fiction which identifies the heir with the ancestor; that is, which regards the succession as a continuation of the existence of the ancestor in the person of the heir. This principle, however, is not confined to this form of acquisition, for, as has been already stated, every acquisition implies a relation of juridical succession between the previous and present owner, or, to use a common metaphor of the law, the taker (buyer) stands in the shoes of the giver (seller).

Now as a summary of the foregoing we find: that proprietary rights may be acquired (1) by *assignment* from a living person which takes effect at once or on the happening of some future event; or, (2) by a *succession* to the position formerly held by a deceased person. Further, that in the first instance the acquisition is effected by or through the act or agreement of *the parties*, that in the latter it results by act or operation *of law* and is wholly independent of the parties. Upon this summary has been erected the entire system of the creation, transfer and extinction of legal relations with respect to land, and it is with the solutions of the questions raised with reference to these two acquisitive methods that all of the practical work of the lawyer is concerned.

And now, having glanced at the principles which underlie the law we may at once begin our study of the technical rules which are built upon them.

CHAPTER II.

THE SUBJECT-MATTER OF REAL PROPERTY.

Evolution of nomenclature—Primary classification—Corporeal hereditaments, land, its increment and annexations—Incorporeal hereditaments, easements, licenses, franchises—A general view of the thing upon which a grant may operate, or in respect to which a succession of proprietary right may be had.

Generally considered.—By the civil law tangible property of all kinds (*bona*)[1] was broadly classified as *movable* and *immovable*,[2] a natural division founded upon the specific character of the various objects that man appropriates for his own use.[3] For many years the classification of the civilians remained unchanged, and land, with its increment, was known as immovable property.[4] But when the Normans subdued Saxon England, and the conqueror parceled out among his followers the spoils of victory, a new name was introduced which has remained to this day. In return for the gifts bestowed by the king he exacted certain duties in the way of military or other service, and it was upon these terms his vassals held the royal bounty. This was known as *feudal tenure*. But as cattle and other movables were too perishable to be subject to any feudal liabilities, they were bestowed as free gifts, and lands, castles, houses—immovable property—only, were held in this manner. Hence

[1] Mackenzie, Inst. 165; Maine, Anc. Law, 273; Coke, Litt. 118b. In continental jurisprudence *biens* (goods) included property of every description. There seem also to be distinctions between the comprehensive terms things (*res*) and rights (*jura*), when applied to ownership, that do not find exact counterparts in the common law.

[2] Taylor, Civ. Law, 475; Story, Conf. Laws, § 13, note 2; Wms. Real Prop. 2; 1 Wash. Real Prop. 3. This division finds expression in this country in the Code of Louisiana. The terms are also still much used by writers on Comparative and Private International Law.

[3] Maine's Ancient Law may be read with profit by those who desire to pursue this subject. See pg. 265 *et seq.*

[4] Taylor, Civ. Law, 475; Wms. Real Prop. 6.

they were called *tenements*, or things held.[1] At first they were held only as temporary grants and for the life of the tenant,[2] but in time, through being often renewed to the heir of the last tenant, they were allowed to descend to heirs,[3] when they were called, in addition, *hereditaments*,[4] and so the old name fell into disuse, and immovable property became known as *lands*, *tenements* and *hereditaments*. Movable property, in like manner, became known as *goods* and *chattels*,[5] and in the old books is always so denominated.

It would seem, however, that with the increase of commerce and the adaptation of legal procedure to meet the growing wants of the people, a new classification was created based on the remedies provided for the deprivation of property. Thus, actions for the recovery of land were called *real* actions, because, it is said, the real or actual object of the suit could itself be secured; on the other hand, where goods and chattels had been taken, the remedy for their loss was an action for damages against the *person* who had appropriated them, and so the two great classes of property began to acquire new names growing out of this marked difference in the nature of the legal remedies provided with respect to them.[6] This new classification seems to have come into

[1] 2 Black. Com. 49; Wright's Tenures, 64. In this connection the student may with advantage consult Hallam's Middle Ages, Vol. II; Hume's England, Vol. II.

[2] The feudal tenant, says Pollock, was regarded rather as a military officer settled upon land than as an owner of same. Freedom of Alienation was not permitted and the tenant, by military service, was no more entitled of his own motion to put a new comer in his place than a soldier on duty to assign his post to another. See, Pollock Land Laws 56.

[3] The inheritance of military tenures was governed by a peculiar and appropriate rule of its own, now familiar by the name of *primogeniture*. On the tenant's death his eldest or only son took the whole of the land, to the exclusion both of daughters and of younger sons.

[4] Coke, Litt. 5b; 2 Black. Com. 17.

[5] The word chattel is the same as cattle. In the early days this was the principal form of moveable property.

[6] Wms. Real Prop. 6; 1 Wash. Real Prop. 2. It is contended by some writers that this phraseology was borrowed from the Civil (Roman) law and is derived from

general use about the beginning of the eighteenth century, and since then goods and chattels have been designated as *personal property*, while lands, tenements and hereditaments have been known as *real property*.

Defined and Classified.— Under the generic term "real property" is included not only land, but all rights and profits issuing from or annexed to the same, that are of a permanent and immovable nature.[1] These latter are sometimes classed as tenements by modern writers, and it has been said that "tenement"[2] is a word of greater extent than land, signifying everything that may be holden by a tenure, and that "hereditament" is still more comprehensive, including both lands and tenements, and, in addition, whatever may be inherited.[3] There were, at common law, things of a mixed and personal nature which by custom were permitted to descend to the heir with the land, but these matters, whether known as heirlooms or otherwise, find no recognition in American law and the refinements just noticed cannot be said to have any real significance in this country at the present time.

Through long usage the word "premises," denoting originally, as well as present, the granting part of a deed of conveyance, has come to be regarded as synonymous with land, or real property, and in this sense is now often employed, even by courts. This usage arose from the fact that the

the distinction between *actiones in rem* and *actiones in personam*. The *actio in rem* of the Roman law, however, might be employed for the assertion of rights in any kind of property, moveable or immoveable. It is said that the prominence of freehold interests in lands, as the subject matter of rights, accounts for the narrow scope of "real actions" in English law. See Digby's Hist. Law of Real Prop. 71. There was, however, from a comparatively early day, an action for the recovery of chattels known as *detinue*.

[1] Coke defines real property as that which "concerns, or is annexed to, or exercisable within lands." Coke, Litt. 19.

[2] The term is now popularly employed to denote a habitable building of any kind.

[3] See Sackett v. Wheaton, 17 Pick. (Mass.) 105; Canfield v. Ford, 28 Barb. (N. Y.) 336. Also 2 Black. Com. 17.

granting clause of a deed always contains the description or designation of the land conveyed and the lawyers, whenever occasion required a reference to such description, instead of repeating the verbiage of the grant would allude to it briefly as the "premises." The laity, observing the custom but misapprehending its import, then came to use the term to indicate the land itself and so it has become a common, although erroneous, method of speaking of land.

So too, the word "estate," which means technically a right or interest in land, has acquired a popular meaning coextensive with land, and is now in common use as a designation of landed property. This term has become even more extensively employed than the word "property" in connection with realty, and in the common speech of the people the expression "real estate" is constantly employed to indicate what the lawyers call "real property." This use of the term has also become common in describing the property of minors under guardianship, of the effects left by decedants, etc., and the double signification which the word "estate" has thus acquired and which is now well established, is one of the difficulties the student encounters in attempting to accurately arrive at its meaning.

Real property, as that term is used to designate the subject matter of proprietary right, has for many years been subject to an arbitrary division and classification based upon physical aspects, according as the existence of a thing is evident to the senses, or rests only in the imagination. By this classification property of every kind is divided into:

I. Corporeal Hereditaments.

II. Incorporeal Hereditaments.

The former consists wholly of substantial and permanent objects, the latter of rights and interests issuing therefrom or attached thereto. This classification, which was rendered popular by Blackstone, has been made the subject of much adverse criticism of late years, but the terms have become

so deeply rooted in our legal phraseology that they will probably always remain.[1]

As was shown in the preceding chapter the law does not concern itself with material objects, except as they may form the subject matter of *rights*, and the lawyers' duty is simply to distinguish between different kinds or classes of rights. The foregoing classification is a division of *things*, and apparently we have land and rights in land, both comprised under the head of hereditaments. In view of what has been said the division is somewhat confusing, for, if by "incorporeal" is meant rights annexed to or issuing out of land, then all hereditaments must be incorporeal for it is only with rights relating to an object and not with the object itself that the laws has to deal. But as we have also seen physical attributes are not essential to the existence of a thing considered as the subject matter of rights, which may be predicated upon anything to which the law will assign a value. It must be understood then, that this classification is simply a survival of archaic names which in reality represent two different classes rights,[2] that is, rights in or over corporeal things and rights in or over incorporeal things. Viewed in this light the classification is not misleading and as in practice we see so distinctly the object and ofttimes so indistinctly the right, it serves the purposes of convenience to make our primary division consist apparently of things.

I. Corporeal Hereditaments.

Generally considered.—Visible and tangible property was by the old law termed "corporeal," as having a body or substance capable of a manual transfer or delivery, or such as admits of an actual surrender of possession. In former times much stress was placed upon what was called the *seisin*[3] or

[1] It is thought that this division may have had its origin in the distinction made by the civil law of *res mancipi* and *res nec mancipi*, that is, things which might or might not be handled, or, corporeal and incorporeal.

[2] See Digby Real Prop. 304; 2 Austin Jur. 707.

[3] The etymology of this word is obscure. The inference has been drawn that it speaks to us of a time of violence, when he who seized land was seised of it, and

legal possession of lands, and conveyances were made by a public and notorious delivery of such possession.[1] This was the essential evidence of investiture of title in the new tenant and was called *livery of seisin*.[2] Hence, corporeal hereditaments were said to lie in *livery*, as distinguished from incorporeal hereditaments, which, not being capable of actual delivery, were said to lie in *grant*.[3]

At present all property may be said to lie in grant, and delivery or surrender of possession is no longer requisite to

hence that seizing land was a common method of acquisition. The better derivation, however, connects it with "to sit" and "to set," hence, a man who is seised seems literally to mean a man who is sitting upon his land. This is not only in consonance with our ideas of actual possession but all the analogies of the law sustain this view. Thus, we speak of a person "settling" upon land; of a country "seat"; and of a person who enters upon land without legal right as a "squatter", or one who sits or "squats" on land.

In the English books, and the works of those American writers who adopt the English spelling, the word is always written "seisin", as in the text. But for many years American orthography has changed "s" to "z" in nearly all words where it possesses the sound of the latter. This has been notably the case in respect to the word "seised", and henceforward, in this work, it will be given the Americanized spelling.

[1] Great importance was attached to the notoriety of the transaction. That all the neighbors might know that A was tenant to B, from the fact that open livery had been made to him, was of the utmost importance to B in order to protect and to enable him to assert his rights as lord. For in case of dispute as to the title, or the right to services or other feudal incidents, the fact of this open and notorious livery of seisin enabled the lord to appeal to the court where suits relating to land were commonly decided and to obtain the verdict of a jury, drawn from the vicinity, who would know themselves, or have heard from their fathers, the truth of the matter. Digby, Hist. Law Real Prop. 146.

[2] The word "livery" seems to be a contraction of the word "delivery" By the civil law property might be acquired by *traditio* or delivery and some writers assert that the application of these rules gave rise to the feudal method of investiture. It is more reasonable to assume, however, that the doctrine was derived from primitive English custom, of which the analogous rules of the Roman law were themselves but a development.

[3] 2 Black. Com. 315; Wms. Real. Prop. 10; Coke, Litt. 9a.

perfect title.[1] The phrase "corporeal," therefore, now possesses comparatively little significance, and is used mainly as a convenient expression to distinguish lands from rights annexed thereto which do not extend to the ownership of the soil.

Land.—In its legal signification "land" comprehends the entire ground or soil of the earth, together with its produce or increment, as vegetation, waters, etc., and has an indefinite extent upwards[2] as well as downwards.[3] It legally includes all houses, buildings and structures standing thereon,[4] and all minerals, fossils, or gases beneath the surface.[5]

In its more restricted as well as popular meaning, it is the solid material of the earth, without reference to the character of the ingredients of which it is composed, whether soil, rock or other substance.[6] As just stated, for many purposes every species of annexation or appurtenance will be considered under the head of land; yet, whenever a question has arisen

[1] 4 Kent, Com. 84; Bryan v. Bradley, 16 Conn. 480; Abbott v. Holway, 72 Me. 298.

[2] An interesting query is raised by this statement for while the law as given in the text is unquestioned, yet within the past few years a very decided advance has been made in the matter of aerial navigation. Should this method of travel become common we must look for a radical change in this long settled principle of law, as every time a baloon passed over the property of the landowner, without his consent, a technical trespass would be committed. The student will further observe that the increment or annexation to which proprietary right extends must be attached to the soil. Hence though a tree growing on adjoining land may send its roots under or branches over the soil of a landowner, while this would be a violation of his rights for which the law would afford him a remedy, it would not give him an ownership in the tree. See Hoffman v. Armstrong, 48 N. Y. 201.

[3] 3 Kent, Com. 378; Coke, Litt. 4a; 1 Cruise, Dig. 58; 2 Black. Com. 18.

[4] Sudbury v. Jones, 8 Cush. (Mass.) 189; Dooley v. Crist, 25 Ill. 551; Green v. Armstrong, 1 Denio (N. Y.) 554.

[5] 3 Kent, Com. 378; Kier v. Peterson, 41 Pa. St. 362; Knight v. Indiana Coal Co., 47 Ind. 110; Riddle v. Driver, 12 Ala. 590.

[6] In England it would seem that this limited meaning is further restricted to arable land (see Wms. Real. Prop. 13); but the English signification, in this respect, has never obtained in the United States.

upon such annexations or appurtenances, the restricted definition above given has always been adopted by the courts, and has even found expression in direct statutory enactments. In some instances state legislatures, with a laudable but misdirected desire to simplify the law and codify elementary principles, have gone so far as to declare that the term "land" includes not only lands, tenements and hereditaments, but "all rights thereto and interests therein." This, however, is not the view usually taken by the courts, and, as a rule, these incidents are generally covered by the more comprehensive term "real property," while the word "land" is restricted in its signification to the definitions first above given.

Minerals.—In all sales and conveyances of superficial areas, coal, metals, and minerals of every description, while in place, are regarded as land;[1] and under the system practiced in the United States, mineral deposits and seams beneath the surface may be sold and conveyed by deed entirely distinct from the surface rights.[2] Such a procedure was impossible under the old English system of conveyancing, at least so far as unopened mines were concerned, because livery of seizin was an inseparable incident of every conveyance and could not be had of a separate interest in land beneath the surface. Hence, notwithstanding such interests were not, in the proper acceptation of the term, rights issuing out of the land, but the very substance itself, they were

[1] By the common law mines of the precious metals were excepted from this rule and held to belong to the crown. In this country there is no substantial difference between a gold mine or a coal mine, so far as the question of ownership is concerned. Some of the states, notably New York and Pennsylvania, seem to have made assertions of sovereign rights in mines of gold and silver, in virtue of the English rule, but generally neither state nor federal governments have claimed any rights other than those which follow the ownership of the soil as an incident. See Boggs v. Merced Co., 14 Cal. 375; Gore v. McBrayer, 18 Cal. 588.

[2] Plummer v. Hillsdale, etc. Co., 160 Pa. St. 483; Sanderson v. Scranton, 105 Pa. St. 469; Williams v. Gibson, 84 Ala. 228; Ryckman v. Gillis, 57 N. Y. 68.

usually regarded as incorporeal hereditaments. But registration having taken the place of the ancient livery, there is nothing incongruous in considering a grant of the substratum of land as much as a conveyance of the surface itself.[1]

The mining of coal and other minerals is constantly developing new questions, and sometimes it is difficult to so apply the law as to give to each owner the right of enjoyment of his property, but in general it may be said that when a surface owner has conveyed the coal, or other mineral, under the land, the grantee owns the coal, but nothing else save the right of access to it and the right to remove it. When it is all removed the interest therein ends and the space it occupied reverts to the grantor. The grant of a mineral seam will not convey any interest in the strata underlying it.[2]

Oils and gases.—Earth oils and volatile gases occupy much the same position in the law of real property as water, and, like water, are not the subjects of property except while in actual occupancy. They are usually classed as minerals,[3] possessing in some degree a kindred nature, and, so long as they remain in place, are fully included in the comprehensive term "land."[4] Unlike other minerals, however, they have the power as well as the tendency to escape without the volition of the owner, and in this respect they possess substantially the same attributes as water. Hence, ownership therein partakes very much of the nature of an incorporeal interest, and a grant of oils or gases is practically no more

[1] Caldwell v. Fulton, 31 Pa. St. 475; Knight v. Indiana Coal Co., 47 Ind. 110; Arnold v. Stevens, 24 Pick. (Mass.) 106; Hartwell v. Camman, 10 N. J. Eq. 128.

[2] Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286. The foregoing is an interesting and instructive case. And see, Williams v. Gibson, 84 Ala. 228; Marvin v. Brewster etc. Co., 55 N. Y. 538; Ewing v. Sandoval etc. Co., 110 Ill. 290.

[3] Stoughton's Appeal, 88 Pa. St. 198; Murray v. Allred, 100 Tenn. 100.

[4] Westmoreland Gas Co. v. Dewitt, 130 Pa. St. 235; Peoples Gas Co. v. Tyner, 131 Ind. 277; Williamson v. Jones, 43 W. V. 562; Gerkins v. Kentucky Salt Co. 100 Ky. 734.

than a mere license to sink shafts and extract same, and is governed by the general rules which apply to licenses.[1]

Growing crops.—The products of the earth which are of annual growth and which owe their existence to the labor of man, are called *fructus industriales.* They include all forms of growing crops, as grain, roots, tubers, etc., and even while still annexed to the soil are treated as chattels and are subject to most of the incidents which attend that class of property.[2]

But although growing crops are usually regarded as personal property, yet, under some circumstances, they are held to be realty. Unless reserved, they will pass under a deed to the purchaser of the land as being annexed to and forming a part of the freehold.[3] When the vendor has made a sale of all his right, title, interest and estate in the land, it is but fair to suppose that the growing crops entered into the view of the purchaser, and formed a part of the consideration for the purchase price which he paid for the land; and this construction is the one generally adopted by the courts.

A distinction is made, however, between *growing* crops and *ripened* crops, and it has been held that the rule above stated only applies when the crops are immature and have not ceased to draw nutriment from the soil at the time of sale. The ripened crop is said to possess the character of personalty, and the fact that it rests upon the land unsevered is of no consequence. In such event the crop is no longer part of the realty.[4]

Trees and herbage.—As we have seen, the term "land" embraces not only the soil but its natural produce growing upon it and affixed to it. Therefore trees and herbage, in place, are integral parts of the realty[5] and pass with a grant

[1] Dark v. Johnston, 55 Pa. St. 164.

[2] Edwards v. Thompson, 85 Tenn. 720.

[3] Bear v. Ritzer, 16 Pa. St. 178; McIlvaine v. Harris, 20 Mo. 457; Bradner v. Faulkner, 34 N. Y. 349.

[4] Garanflo v. Cooley, 33 Kan. 137; Penhallow v. Dwight, 7 Mass. 34; Howe v. Batchelder, 49 N. H. 208.

[5] Claflin v. Carpenter, 4 Met. (Mass.) 580; Rich v. Zielsdorf, 22 Wis. 544; McKenzie v. Shows, 70 Miss. 388.

of the land.[1] So, too, the fruits of trees, perennial bushes and grasses growing from perennial roots, are, while unsevered from the soil, considered as belonging to it and a part of the realty.[2] These are called, by way of distinction from those things which are dependent upon annual cultivation, *fructus naturales.* Trees and shrubbery grown upon premises leased for nursery purposes will generally be held to be personal property as between landlord and tenant, but between parties standing in other relations will pass with the land unless specially reserved.

Manure.— In sales of agricultural lands, it is a generally accepted rule that manure lying upon the property is to be regarded as realty, and that same will pass to the vendee as an incident of the land unless specially reserved in the deed.[3] In a few instances a distinction has been made between manure lying in heaps in a barnyard and where it is placed or spread upon the land, the former being regarded as personalty; but this distinction, which originally was made in favor of tenants, is not generally recognized.[4] The rule as just stated does not apply to manure made in livery-stables, or in buildings unconnected with agricultural property, and out of the course of husbandry;[5] nor even in the business of stock-raising, the stock not being fed upon the products of the land.[6] In such cases the manure is not con-

[1] Smith v. Price, 39 Ill. 28; Hutchins v. King, 1 Wall. (U. S.) 59.

[2] Sparrow v. Pond, 49 Minn. 412; McKenzie v. Shows, 70 Miss. 388.

[3] Kittredge v. Woods, 3 N. H. 503; Haslem v. Lockwood, 37 Conn. 500; Lewis v. Lyman, 22 Pick. (Mass.) 437.

[4] The reason for the rule, it is said, is that it is for the benefit of agriculture that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such undoubtedly is the general usage. Fay v. Muzzey, 13 Gray (Mass.), 53; Lassell v. Reed, 6 Greenl. (Me.), 222; Middlebrook v. Corwin; 15 Wend. (N. Y.), 169; Sawyer v. Twiss, 26 N. H. 345.

[5] Proctor v. Gilson, 49 N. H. 62.

[6] Snow v. Perkins, 60 N. H. 493.

sidered as incident to the land, and does not pass by a conveyance of it.[1]

Houses and buildings.—Within the term "land" are included all houses and buildings standing thereon, which pass by a conveyance of the land without special mention;[2] and in all contracts for the sale and conveyance of lands, the improvements resting upon or affixed to them at the time are considered as part of the purchase. On the other hand, land which is essential to the use of a building will pass by a conveyance of the building if it appears that such was the intention of the parties.[3] Thus, where a grant was made of a mill, it was held to include the land under and adjoining same.[4]

But houses and buildings are realty only while in place. A severance changes the character of the property from real to personal, irrespective of the means by which it may be accomplished; and, so far as the legal effect is concerned, it matters not whether the severance was by act of God or act of man.[5]

Fixtures.—There is a species of property which is said to constitute the border land between realty and personalty, partaking of the characteristics of both, to which has been given the name *fixtures*. A fixture has been defined as a personal chattel annexed to land, which may be severed and removed by the party who affixed it, or by his personal representatives, against the will of the owner of the freehold.[6] Yet the term "fixture" seems to be an uncertain title, and in many cases—possibly a majority—is used in exactly a contrary sense to the definition just given, being employed to indicate a chattel annexed to realty so as to become a part of it.

It is a rule of the common law that whatever is accessory to real estate is a part of it, and passes by alienation. The

[1] Plummer v. Plummer, 30 N. H. 558.

[2] West v. Stewart, 7 Pa. St. 122; Leland v. Gassett, 17 Vt. 403.

[3] Gibson v. Brockway, 8 N. H. 465; Moore v. Fletcher, 16 Me. 66.

[4] Whitney v. Olney, 3 Mason, 280.

[5] Buckout v. Swift, 37 Cal. 433.

[6] Bouv. Law Dict. 593.

necessities of trade have caused a modification of this rule so far as it may affect the relation of landlord and tenant, and courts recognize and enforce the right of removal by tenants of chattels annexed to the freehold for the purposes of manufacture, agriculture, trade, or domestic convenience. But as between vendor and vendee, and executor and heir, the rule is still applicable, except so far as it may have been modified by statutory regulation; and where the question is not affected by the terms of a contract of sale, appurtenances and chattels attached to lands, and contributing to their value and enjoyment, pass by a grant of the freehold, and cannot be severed by any person other than the owner.[1]

Just what shall be regarded as a fixture, and what a chattel sufficient to escape the operation of the foregoing rule, is not always an easy matter to decide. Many things pass by a deed of lands, being put there by a vendor, which, if placed by a tenant, might have been removed; and they will pass to a vendee, although attached for the purposes of trade, manufacture, or even ornament or domestice use. Thus, utensils and machinery appertaining to a building for manufacturing purposes; gas-pipes, fittings and other apparatus designed for the purpose of illumination; water-pipes and conduits; ranges, boilers and tanks attached in a permanent manner,[2] will be considered a part of the realty. Stoves and hot-air furnaces or other appliances for heating, when put in as a permanent annexation, have been held to pass,[3] though on this point the authorities are not agreed. Window and door screens, storm doors, or other adjuncts made and fitted to a house, usually go with it,[4] and generally anything that the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed unless specifically reserved.[5]

[1] Tourtellot v. Phelps, 4 Gray (Mass.), 378; Kennard v. Brough, 64 Ind 24; Lapham v. Norton 71 Me. 83; Stoner v. Hunsicker, 47 Pa. St. 514.

[2] Miller v. Plumb, 6 Cow. (N. Y.) 665; Hays v. Doane, 11 N. J. Eq. 96; Fratt v. Whittier, 58 Cal. 126.

[3] Goddard v. Chase, 7 Mass. 432.

[4] Pettengill v. Evans, 5 N. H. 54.

[5] Miller v. Plumb, 6 Cow. (N. Y.) 665; Goddard v. Chase, 7 Mass. 432; Hays v. Doane, 11 N. J. Eq. 96; Smith v. Commonwealth, 14 Bush (Ky.) 31; Stockwell v. Campbell, 39 Conn. 362.

The rule, therefore, would seem to be that, where the annexation is permanent in its character and essential to the purpose for which the property is used or occupied, it should be regarded as realty and pass with a grant of the freehold; and this, notwithstanding the connection between them, may be such that it may be severed without physical or lasting injury to either.[1]

The mode of annexation, while of controlling efficacy as between landlord and tenant, and sometimes between executor and heir, is of comparatively small moment as between vendor and vendee—the purposes of the annexation and the intent with which it was made being, in most cases, the important consideration.[2] Physical annexation is not indispensable provided the article is of an accessory character, and in some way in actual or constructive union with the principal subject, and not merely brought upon it. It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty;[3] and even in case of a less thorough method, the manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession.[4] Still, there is no unvarying test; and neither the mode of annexation nor the manner of use can ever be said to be entirely conclusive, the express or implied understanding of the parties being usually the pivot on which the question turns.[5]

It will, of course, be understood that parties may themselves, by express agreement, fix upon chattels annexed to realty whatever character they may see fit.[6] Hence, prop-

[1] Green v. Phillips, 26 Gratt. (Va.) 752; Keeler v. Keeler, 31 N. J. Eq. 191; Capen v. Peckham, 35 Conn. 94.

[2] McRea v. Bank, 66 N. Y. 489; Wheeler v. Bedell, 40 Mich. 693; Meigs' Appeal, 62 Pa. St. 33; Woodman v. Pease, 17 N. H. 284.

[3] Lyle v. Palmer, 42 Mich. 314.

[4] Wheeler v. Bedell, 40 Mich. 693.

[5] McRea v. Bank, 66 N. Y. 489; Meigs' Appeal, 62 Pa. St. 33; Hill v. Wentworth, 28 Vt. 436; Bainway v. Cobb. 99 Mass. 458.

[6] Fratt v. Whittier, 58 Cal. 126; Bartholomew v. Hamilton, 105 Mass. 239.

erty which the law regards as permanent fixtures may be by them considered as personal chattels, and that which, in contemplation of law, is regarded only as personalty they may treat as a fixture, and whatever may be their agreement courts will enforce it.[1]

Aqueducts, Conduits and Pipes.—The exigencies of modern commerce have introduced many appliances that, from the nature of their construction, can properly be classed only as realty, notwithstanding their apparent similitude to those things which usually pass under the name of personalty. The authorities which tend to fix the status of these appliances deal mainly with the subject on questions raised under the taxing power of the state but they are equally effective in declaring the rule which should prevail whenever their character comes into controversy in other ways.

Under the broad principle that "land" includes all increments, annexations and fixtures, connected therewith and all rights thereto as well as interests therein, it has been held that conduits and pipes used to distribute water, gas, oil, etc., partake of the nature of realty and are properly classed as such. When such pipes are the property of the owner of the soil in or upon which they rest no question will probably arise. In such case they may properly be regarded as fixtures, permanent in character and a part of the land that sustains them.[2] But where they are constructed and operated by parties who have no title to the soil, or at most but a license for their occupation, their classification becomes a matter of doubt. In England it would seem that such property would now be regarded as personalty,[3] and in this country they have, in several instances, been classed as chattels.[4] So far as they have been considered with respect to the purposes of taxation, however, the general tendency seems to be to regard them as realty. As to whether they are to be considered as

[1] Smith v. Waggoner, 50 Wis. 155.

[2] Philbrick v. Emry, 97 Mass. 134; and see, McKeage v. Ins. Co., 81 N. Y. 38.

[3] Waterworks v. Bowley, 17 Q. B. 358.

[4] See Commissioners v. Gas Light Co., 12 Allen (Mass.), 75; Gas Light Co. v. State, 6 Cold. (Tenn.), 310.

appurtenant to the place of supply, i. e. pumping station, power house, etc., there is some difference of opinion. Those cases which so contend,[1] and yet class them as realty, seem to be founded on a wrong principle, as land cannot be appurtenant to land, nor should they be considered in the same light as house drains or erections of that character.

While the question is yet one of doubt, particularly when applied to the relations of parties arising out of contract in respect to such property or the lands which contain same, yet the better solution would seem to be that mains, pipes, conduits, etc., in place, may be considered real property and subject to the rules which govern this branch of the law.[2]

Water.—It has been said to be vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country,[3] and that property in water, and in the use and enjoyment of it, is as sacred as in the soil over which it flows.[4] But water, from its peculiar nature, is not susceptible of the same use or possession as land, and property therein is at best a mere *usufructuary right;* and in every case, where of sufficient volume and depth, such right is subservient to the public right of navigation. If the water is not navigable it is, for all practical purposes, the property of the owner of the subjacent soil; and in any event he is entitled to every beneficial use of the same which can be exercised with a due regard for the rights of the public.[5]

In the case of running water the riparian proprietor has a right to the use and enjoyment of it and the benefits to be derived from it as it flows through his own land; but, as

[1] See Oskaloosa Water Co. v. Board of Equalization, 51 N. W. Rep. 18; Hutchins v. Masterson, 46 Tex. 534.

[2] Pipe Line Co. v. Berry, 52 N. J. L. 308; Gas Co. v. Thurber, 2 R. J. 15; Water Co. v. Lynn, 147 Mass. 31; People v. Cassity, 46 N. Y. 46.

[3] Gavitt v. Chambers, 3 Ohio, 497.

[4] Lorman v. Benson, 8 Mich. 32; Wadsworth v. Tillotson, 15 Conn. 366.

[5] Cary v. Daniels, 5 Met. (Mass.) 236.

this right is common to all through whose land it flows, it follows that no one can wholly destroy or divert it so as to prevent it from passing to the property below, or wholly obstruct it so as to throw it back upon the land of the one above.[1]

In the case of standing water, as well as water percolating through the soil, while absolute ownership, in the strict sense of the term, is of course impracticable, yet the right of property, so far as the element is capable of beneficial use, is complete in the owner of the freehold, free from any usufructuary rights in others.[2]

The privileges and benefits resulting to the owners of lands bounding or abutting upon a water-course, or through whose possessions it may flow, are known as *riparian rights*, and partake of both a corporeal and an incorporeal character.

A *water-course*, as that term is used in law, means a stream of any kind which flows in a distinct channel between definite banks, but it is not necessary that the flow should be continuous nor that the stream should possess any particular depths.[3] On the other hand, *surface waters* are such as lie upon or spread over the surface of land, or percolate the soil, as in swamps and sloughs, and do not flow in any particular direction.[4] But as long as a stream can be traced

[1] White v. Land Co. 96 Ga. 415; Tennessee etc. R. R. Co. v. Hamilton, 100 Ala. 252. The text states the common-law doctrine and that which prevails in the larger portion of the United States. But of late years this rule has been rejected in several of the Western and Pacific Coast States as inapplicable to the conditions where there exist. In those states the first appropriator of water, for a useful purpose, has a prior right thereto, and may divert it from its natural course. In those states the soil is arid and unfit for cultivation unless irrigated, hence it is said that the necessities of the people compel a change in the rule and the policy has been to permit diversion and to protect the first appropriator in the enjoyment of the water as a recognized property right. See, Reno Smelting Works v. Stevenson, 20 Nev. 296.

[2] Hanson v. McCue, 42 Cal. 303; Wilson v. New Bedford, 108 Mass. 261; Williams v. Ladew, 161 Pa. St. 283.

[3] Chamberlain v. Hemingway, 63 Conn. 1; Barkley v. Wilcox, 86 N. Y. 140; Gibbs v. Williams, 25 Kan. 214; Case v. Hoffman, 84 Wis. 438.

[4] Case v. Hoffman, 84 Wis. 483.

it does not lose its identity or cease to be a water-course because at points it spreads out into marshes or swamps.[1]

Continued — Navigable and non-navigable waters.— From an early day water-courses, streams, and other bodies of water, have been classed as *navigable* and *non-navigable* but the distinction did not rest in actual capacity for floatage or the susceptibility of the water course for beneficial purposes as a way. The classification grew out of the exigencies of the old admiralty law, and, as the rivers of England were comparatively small with no cities located upon them where a port could be established for vessels engaged in foreign trade to enter or depart with cargoes, the maritime jurisdiction was confined to those waters where the tide ebbed and flowed. By the common law only waters of this character were considered navigable. This rule was engrafted upon the legal system of the United States and for many years was received without question; indeed more than half a century of national existence had passed before any attempt was made to change the character of the admiralty jurisdiction. This is easily accounted for in the fact that the greater part of the waters of the original states, capable of commercial uses, were tide-waters, and that in those states, in any degree commercial, where courts of admiralty were called upon to exercise their jurisdiction, every public river was tide-water to the head of navigation.[2] But with the expansion of national territory and the incidental acquisition of great inland seas and water-ways, as well as the changed conditions relating to navigation, came a necessary rejection of the old common-law test of navigability, and the establishment of a new rule to the effect that any waters on which commerce can be carried on is subject to the jurisdiction.

The foregoing would have little connection with the law of real property were it not that the jurisdiction of the ad-

[1] Macomber v. Godfrey, 108 Mass. 219; Munkres v. R. R. Co., 72 Mo. 514; Robinson v. Shanks, 118 Ind. 125.

[2] See, Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443.

miralty courts was also made the standard in determining the property rights, of riparian owners. Under the influence of the common-law rule many of the states have laid the foundations of their doctrines and policy with respect to the ownership of the soil under water-ways navigable in fact, as well as in respect to the uses and rights which may be enjoyed and asserted by the riparian owner. A further result has been to introduce some confusion into our law growing out of the distinction between waters navigable in fact and navigable in law.

We find that there are two doctrines now applied in this country; the *common-law* rule,[1] which limits navigability in law to the ebb and flow of the tide and vests ownership in the soil covered by the water in the abutting land owner; and, what we may call the *federal* rule,[2] which limits riparian ownership to the shore and vests title to the bed of the water-way in the state in all cases where the water is navigable in fact. The subject will receive further mention in other parts of the work.

Riparian Rights.—As water is not susceptible of the same uses as land we have seen that about all that can be had in it is a *usufructuary right.* It may be used for floatage, for consumption, for cleansing, for power, either directly or indirectly, for irrigation, and for many other purposes, while the land adjacent and subjacent derives several important qualities and characteristics by reason of its contiguity. All of these matters come strictly within the legal acceptation of the term "property." They are known respectively as *riparian*[3] and *littoral*[4] rights. Both terms are in common use and both mean much the same but a differentiation seems to be in progress whereby the former has respect more particularly to the water and the uses to

[1] This rule seems to find the largest adherence. It prevails in nearly all of the original states and in Illinois, Kentucky, Michigan, Mississippi, Ohio, Wisconsin, and possibly others of the states.

[2] This rule prevails in the Federal Courts, Alabama, Arkansas, Iowa, Kansas, Minnesota, Missouri, North Carolina, Tennessee, Virginia, and West Virginia.

[3] From the Latin *ripa*, a bank.

[4] From the Latin *littus*, the sea shore.

which it may be applied while the latter is used to denote privileges and benefits inuring to the land bounding upon the water.[1]

Every riparian or littoral owner has a right of access to the deep water in front of his lands, and he may build suitable landings for this purpose; he may protect his land from the ravages of the water by erecting barricades; and generally may improve his water front in any way that does not interfere with the public rights of navigation.[2] He is entitled to the alluvion which forms against his land, and to the flotsam which may be cast upon it. It has been held in some states that he may fill in the shallow water in front of his land[3] and reclaim submerged flats,[4] but the authorities are not in accord on these points.

Ice.—While ice is only water in a congealed state, it nevertheless partakes largely of the general characteristics of land, and is capable of an ownership not unlike that by which land is held. It is generally regarded as being connected with, and in the nature of an accession to, the land, being an increment arising from formations over it, and belonging to the land properly, as being included in it in its indefinite extent upwards;[5] and such, no doubt, must be the character accorded to it so long as it remains in place upon the soil.[6] In this condition it would certainly pass as a por-

[1] Thus in the arid sections of the West the term riparian rights is applied to the interests involved in artificial ditches constructed for the purposes of irrigation; so too, the right to a mill race, or to flow upper proprietors, are classed as riparian rights. On the other hand the right to wreckage thrown on land by the sea; the right to construct wharfs, piers, etc., are frequently designated as littoral rights.

[2] See, Yates v. Milwaukee, 10 Wall. (U. S.) 497, an instructive case; Shirley v. Bishop, 67 Cal. 543; Mather v. Chapman, 40 Conn. 382; Chicago v. Laflin, 49 Ill. 272; Musser v. Hershey, 42 Iowa, 356.

[3] Miller v. Mendenhall, 43 Minn. 95; New Jersey etc. Co. v. Morris etc. Co. 44 N. J. Eq. 398.

[4] Davidson v. R. R. Co. 3 Cush. (Mass.) 91; Union Warf v. Starin, 45 Conn. 585.

[5] Washington Ice Co. v. Shortall, 101 Ill. 46.

[6] Hydraulic Co. v. Butler, 91 Ind. 134; Woolen Mill Co. v. Smith, 34 Conn. 462; Paine v. Woods, 108 Mass. 173.

tion of the realty upon a sale of the estate to which it is attached.

Ice has not been much dealt with as property, however, until very modern times, and for this reason no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they have usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. In its essentials ice is only the product of water which has become fixed by freezing; in this condition it draws nothing from the land, and if removed will lose its identity by melting. It has no organic connection with the land, and if severed can only be joined to it again by the alternate process of melting and freezing. In many cases it is liable to disruption and consequent loss to the freeholder by being swept away, while its ephemeral character renders it incapable of any permanent beneficial use as a part of the soil, and it attains its greatest value only when removed from its original position. Regarding it, therefore, in this light, and with reference to its uses in fact as a commercial commodity, while it may for many purposes be justly regarded as part of the realty when resting in place, yet a sale of ice already formed, as a distinct and specific article, may properly be regarded as a sale of personalty, whether in or out of the water.[1]

Church pews.—Inclosed seats in churches do not appear to have been known, according to the modern idea, until long after the reformation, and were not in general use until about the middle of the seventeenth century. Prior to that time no separate seats were allowed, except in a few instances, and the body of the church was common to all.

When sittings were first introduced they were usually sold to persons occupying them, and in this manner the purchaser became seized of a peculiar kind of an estate therein, and the questions which have been raised in controversies relative thereto have been productive of some very remarkable decis-

[1] Higgins v. Kusterer, 41 Mich. 318.

ions. According to the English idea the interest of a pew-owner is of an incorporeal nature only—an easement, as it were—and consists mainly of the right to enter and occupy during the celebration of divine service. In the United States, in the absence of a statute declaring their status, they have been considered as partaking of the nature of realty;[1] and the owner has been held to have an exclusive right of possession and enjoyment, for the purposes of public worship, not as an easement, but by virtue of an individual right of property;[2] in other words, although the right thus acquired is a limited and qualified interest, it is, notwithstanding, an interest in land. This right, however, even though it be regarded as an interest in realty, does not extend to the fee, and for all practical purposes is usufructuary only. Though not an easement in name, it is so in reality.[3]

As a matter of fact, however, the old system of pew conveyances has almost become obsolete. Deeds are no longer given in the majority of churches, and the sittings are let by what amounts to nothing more than a mere license.

Corporation stock.— It would seem to be the law in England that shares in the property or stock of a corporation may, under certain circumstances, be regarded as real property. Thus, where the corporate powers are to be exercised solely in respect to land, as where original authority is given by charter to improve a river, construct a canal, erect waterworks, etc., and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed realty.

But this doctrine, while it may seem to have received a faint assent in some of the earlier American cases,[4] is not,

[1] O'Hear v. DeGoesbriand, 33 Vt. 593; Shoier v. Trinity Church, 109 Mass. 1; Brumfield v. Carson, 33 Ind. 94.

[2] Presbyterian Church v. Adams, 21 N. J. L. 325; Church v. Wells, 24 Pa. St. 249; Cox v. Baker, 17 Mass. 438.

[3] Union House v. Rowell, 66 Me. 245; Van Houten v. Ref. Dutch Church, 17 N. J. Eq. 126.

[4] See, Wells v. Cowles, 2 Conn. 567; Price v. Price, 6 Dana (Ky.), 107.

and never has been, generally recognized in the United States.

Heir-looms.— At common law there are classes of chattels which are considered as so annexed and necessary to the enjoyment of lands acquired by inheritance, that they are deemed to be a part of it, although not coming within the definition by which fixtures are ordinarily determined. Inasmuch as they are held to descend to the heir with the land they have received the name of *heir-looms*. How this word originated it is now impossible to say, nor do the commentators agree with regard to its etymology. Presumably it alluded in its early use to the loom, which formed one of the chief features of the simple furnishings of the homes of the people, but some writers derive the word from the Saxon "loma," which, it seems, signified domestic vessels and utensils generally. But whatever may have been its origin the term became used to imply all articles of household utility, and from these articles came to include even wild and domesticated animals. So, it has been held that the term would cover and include deer in a park, fishes in a pond, rabbits in a warren, doves in a dove cote, and that all these things were a part of the inheritance and descended to the heir. So also, of charters, deeds, and other evidences of the ownership of the land, together with chests or boxes in which they were contained, and in one instance where an ancient horn had immemorially gone with the estate, and had been delivered to the plaintiff's ancestors to hold their land by it, it was decreed that it should go with the land as an heir-loom.[1]

While the term is still employed in a colloquial way, it has no legal significance whatever in the United States.

II Incorporeal Hereditaments.

Generally Considered.—We will experience no difficulty in adapting our ideas of ownership to property of a corporeal nature, like land, and can readily understand how dominion

[1] Cruise Dig. Tit. I s.6.

over same may be acquired and retained. But where the special subject of property has no reference to the ownership of the soil and consists wholly of an intangible interest in, or right to, that which proceeds out of or is theoretically annexed to the land, the matter assumes perplexing phases. There are, however, a number of such rights or interests which are of a nature sufficiently permanent to have applied to them the same ideas of duration or quantity of ownership that we apply to lands, and a little familiarity with these forms of right will serve to show that one is as much property as the other.

While the term "incorporeal" is still employed to designate certain kinds of real property of an invisible or intangible nature, yet its original and early significance has wholly disappeared. The test or distinction between corporeal and incorporeal property, as these terms were used at common law, lay in the fact of susceptibility of actual delivery, and such things as were incapable of same, because of their intangible nature, were denominated incorporeal. Being incapable of an actual delivery, they could be transferred or conveyed only by *grant* or deed; hence incorporeal property was said to lie in *grant*, while corporeal property, or such as admitted of some manual and visible act of delivery, was said to lie in *livery*.[1]

Incorporeal property, in the sense in which that term is used in the English law,[2] finds but few examples in the United States, and, although the term is in common use, it is usually confined to those classes of property rights generally known as *easements*, *licenses* and *franchises*, or to those interests which pass under a conveyance of land by the generic name *appurtenances*.

[1] Coke, Litt. 9a; 1 Prest. Est. 13; Wms. Real Prop. 239.

[2] The term "incorporeal hereditament" is one of the abstractions of medieval law. Any permanent right, which was of a transferable nature, was regarded as a thing, that is, very like a piece of land, and a complete list would be long and miscellaneous. Blackstone ennumerates ten sorts, but his catalogue is only of the principal kinds and by no means exhaustive.

Under the English law the term included advowsons and rents, which were held to be of a real nature; offices exercisable within certain places, though not annexed to land, were said to savor of realty; while dignities or titles of honor, having originally been annexed to land, were also considered as real property.[1] None of the foregoing can properly be said to have ever been recognized in this country.

In some particulars incorporeal hereditaments resemble estates, and by some writers have been confounded with same. They are, however, distinct species of property in which estates may be created in much the same manner as in corporeal property, and the fact that they are annexed to or issue out of land does not affect their character in this respect.

Appurtenances.—Land is usually conveyed together with the hereditaments and appurtenances thereunto belonging. An *appurtenance* may be described in general terms as something belonging to another thing as principal, and which passes as an incident to such principal thing.[2] Thus, in a grant of lands everything passes which is necessary to the full enjoyment thereof, and which is in use as an incident or appurtenant thereto. As, if a grant is made of a water-mill the raceway passes with it as an appurtenance. In such

[1] Incorporeal hereditaments at common law comprised advowsons, tithes, commons, ways, offices, dignities, franchises, rents. It would seem also that the elementary writers were wont to include as incorporeal hereditaments certain classes of estates, notably reversions and remainders, but this is confounding a *right* with a *thing*. This classification grew out of the fact that there could be no livery of seizen of an estate to commence in possession in the future.

[2] 1 Bouv. Law Dict. 136. The definition in the text very perfectly describes an appurtenance, but in Leonard v. White, 8 Mass. 8, it is described as "that which is used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereto it is appurtenant," and this also very accurately defines the term. By the Roman law it was defined as "such things as stand in actual relation to another thing for the purpose of continually serving it, without being so connected with it as to appear a part thereof." See, Mackeldy's Roman Law § 166.

case the mill is the principal thing, the race belonging to it as an incident. The term is made to cover a wide diversity of subjects, and is often a source of contention for this reason. But under appurtenances nothing passes except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper use of the estate to which they are annexed.[1]

It is an invariable rule, however, that a thing corporeal cannot be made appurtenant to a thing corporeal, and hence land is never appurtenant to land;[2] nor will the term carry with it any rights or interests in the property of the grantor on other lands which he owns;[3] neither can it be made to include anything not situate on the land described in the conveyance, although used in connection therewith.[4] There are apparent exceptions to these rules in some of the earlier cases in the construction of wills, where the word "appurtenances" has been construed in such a manner as to take it out of the strict legal and technical definition above given,[5] but this enlarged sense has never been applied to grants by deed.

Under the head of appurtenances are classed rights of way, rights of flowage, race-ways, water-powers, and generally any other incident in the nature of an easement that is requisite to a fair enjoyment of the grant, or which has been necessarily and incidentally used in connection with the subject of the grant, and which is of a different but congruous nature.

Easements.—The most important class of incorporeal hereditaments known to our law is embraced in the general

[1] Ogden v. Jennings, 62 N. Y. 526; Cave v. Crafts, 53 Cal. 135.

[2] Grant v. Chase, 17 Mass. 443; Barrett v. Bell, 82 Mo. 110. Sometimes where the intention is clearly expressed that land shall pass under that name, the law will give effect to the grant notwithstanding the misnomer. Thus the devise of a mill and its appurtenances was held to pass the land under and immediately adjoining the mill which was necessary to its beneficial use, but in this case the court did not proceed upon the theory that the land was a mere appurtenance to the mill but a part of it; Whitney v. Olney, 3 Mason 280.

[3] Frey v. Drahos, 6 Neb. 1; Ogden v. Jennings, 60 N. Y. 526.

[4] Frey v. Drahos, 6 Neb. 1.

[5] See Jackson v. White, 8 Johns. (N. Y.) 59.

term *easements.* As to the exact legal value of this term neither courts nor writers are wholly agreed and in practice it is frequently employed to indicate rights which in strictness are only licenses. We may say, however, that an easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land, by reason of such ownership, has a right to enjoy in or over the land of another, or, more technically defined, it is an incorporeal right existing in favor of and imposed upon corporeal property.[1] An easement implies an interest in land, yet it is an interest without profit, is always distinct from the ownership of the soil and is not inconsistent with a general property in the land owner.

In the definition above given it will be observed that two estates or properties are involved, that is, one landowner, by virtue of such ownership, acquires for the better enjoyment of his property a privilege or advantage in or over the land of another proprietor. This privilege we call an *easement.* The converse of an easement, or the burden it imposes on the land in or over which it is enjoyed, is frequently called a *servitude.* The land to which the privilege is attached is styled the *dominant* tenement or estate, and that against which it exists, the *servient* tenement or estate. Thus, if A, being the owner of an entire property, should divide his lands and sell part of same to B and at the same time should grant to B the privilege of a roadway ten feet wide over and across the part of the lands which he retained, B would thereby acquire an easement in favor of his lands while the lands of A would be impressed with a corresponding servitude. In such case B's land would be the dominant estate and A's the servient. As these rights are not usually personal, and do not change with the persons who may own the respective estates, it is very common to personify the estates themselves as owning or enjoying the easements.

[1] Consult, 3 Kent Com. 435; Wash. Easements, 5; Goddard Easements, 2; Walk. Am. Law, 265. This species of right is very ancient and was known under the civil law as a *predial servitude.* See, Sander's Justinian.

Classification.—Easements are classed as *appurtenant* and *in gross*. When appurtenant they are attached to land as an incident and pass with it, whether the land be conveyed for years, for life, or forever. When in gross they are purely personal to the holder and cannot be assigned, nor will they pass by descent. In either case they cannot be separated from the land to which they inhere.[1]

An appurtenant easement attaches to every part of the land to which it is incident, no matter into how many parts it may be subdivided or however small, and is to be enjoyed by all of the owners, no matter how many they may be.[2]

An easement in gross, being merely a personal privilege, is more in the nature of a license and will generally be comprehended under that head. Indeed such a privilege, personal to the holder and exercised irrespective of any land of which he is possessed, cannot, in legal strictness, be called an easement, for the true meaning of that term always makes it an incident of land and exercisable in favor of one estate and against another. Custom, however, has to some extent sanctioned the use of the term in connections to which it does not strictly apply.

Easements are also said to be *continuous* and *non-continuous*, although the distinction does not appear to be very clear in many of the cases where the classification has been attempted. By a continuous easement is usually meant one which may be enjoyed without any act on the part of the person entitled thereto; as where a spout discharges water whenever it rains, or where a drain is employed to carry surface water over land. A non-continuous easement, on the other hand, is one to the enjoyment of which the act of the party is essential, and which finds its most common illustration in the case of a way. The word "continuous," therefore, when used in this connection, has a somewhat unusual significance and implies not only that the servient estate shall be continuously subject to the use or burden but that such use shall be enjoyed without any intervention of

[1] Koelle v. Knecht, 99 Ill. 496. [2] Garrison v. Rudd, 19 Ill. 558.

the act of man.[1] The subject frequently becomes of great importance in determining the effect to be given to implied grants.

With respect to the servient estate easements are further divided into *affirmative*, or such as permit something to be done on such estate, and *negative*, or such as restrict the owner of the servient estate from doing that which he otherwise might. These may be illustrated in the former case by rights of way or flowage, in the latter by the inhibition of the erection of buildings which would tend to impair the enjoyment of light and air by the dominant estate.[2]

While easements may be created for an infinite variety of purposes they are usually such as relate to rights or privileges of ingress or egress. The most common form of easement is a right of way. This, in every case, is but a mere right to use the surface of the soil for the purpose of passing and repassing and the incidental right of properly fitting the surface for that use, but the owner of the soil has all the rights and benefits of ownership consistent with such easement.[3] The right to overflow the lands of the servient estate to the extent necessary to the profitable enjoyment of the dominant estate is another familiar form of easement in connection with water-mills or hydraulic works of any kind. The right of lateral support of buildings; of receiving air, light or heat from or over other land; of receiving and discharging water, etc., are all instances of easements.

Creation and Extinction.— An easement is technically created only by *grant* or *confirmation;* but such grant may be implied when the existence of the easement is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that when one grants anything to another he thereby grants to him the means of enjoying it, whether expressed or not;[4] and in pursuance of this princi-

[1] Bonelle v. Blakemore, 66 Mass. 136; Lampman v. Milks, 21 N. Y. 505.

[2] 1 Wash. Real Prop. 301; Tild. Lead. Cas. 107.

[3] Perley v. Chandler, 6 Mass. 454.

[4] Lanier v. Booth, 50 Mass. 410; Kuhlman v. Hecht, 77 Ill. 570; Collins v. Prentice, 15 Conn. 39.

ple the general rule is, that in every deed of a part of the grantor's land, without express provision on the subject, there is an implied grant or reservation of all easements *of necessity* for the enjoyment of the part conveyed or the part retained.[1] Thus, if land is sold which is inaccessible except by passing over the adjoining land of the grantor or by committing a trespass upon the land of a stranger, or when an owner sells a part of his land and retains a part which cannot be reached except by passing over the part sold, a right of way of necessity will be raised founded upon an implied grant under the principles just stated.

An easement may also be established by *prescriptive user* from which a grant is inferred. Where an easement is established by prescription or grant presumed from user, it is limited to the actual user.[2] And so in like manner an easement of necessity arising by implication cannot be extended beyond what the existing necessities of the case require,[3] and continues only so long as the necessity itself exists.[4]

Easements may be extinguished by *release*, by *merger* or by *abandonment*. Where the owner of the dominant estate acquires the fee of the servient estate, the easement becomes merged in the unity of possession and title thus occasioned,[5] although it may be revived in the event of the severance of the tenements where the use is apparent and continuous and necessary to the reasonable enjoyment of the severed part.[6]

Mere *non-user*, of itself will not materially effect the right

[1] Dillman v. Hoffman, 38 Wis. 559; Marvin v. Brewster, etc. Co., 55 N. Y. 553; Collins v. Prentice, 15 Conn. 39; Taylor v. Townsend, 8 Mass. 411.

[2] Bradley's Fish Co. v. Dudley, 37 Conn. 136.

[3] Lide v. Hadley, 36 Ala. 627; Pierce v. Selleck, 18 Conn. 321.

[4] Ogden v. Jennings, 62 N. Y. 532· Warren v Blake, 54 Me. 276.

[5] Tyler v. Hammond, 11 Pick. (Mass.) 193; Atwater v. Bodfish, 11 Gray (Mass.), 150. This results from the principle that a man cannot have an easement in his own lands.

[6] Morrison v. King, 62 Ill. 30; Lampman v. Milks, 21 N. Y. 505; Brakely v. Sharp, 10 N. J. Eq. 206; Thompson v. Miner, 30 Iowa, 386.

to an easement,[1] but if continued for a long period of time, say twenty years, under such circumstances as show an intention of abandonment, it may be sufficient to extinguish such easement; and even an abandonment for a shorter period, showing an intention to release or surrender the right, and which is acted upon by the owner of the servient tenement so that it would work harm to him if the easement were thereafter asserted, would operate to extinguish same.[2] It would seem, however, that the question of abandonment is always one of intention, depending largely upon the facts of each particular case; and while time is one of the elements from which intention may be inferred, yet the question seems to depend less upon the duration of time than the acts which accompany the fact of disuse.[3]

Natural Rights.—There is a certain class of privileges which is sometimes confounded with easements, but which, as a matter of law and fact, has nothing in common with them except the appearance of benefits on the one hand and burdens on the other. This is illustrated in the right which every owner of land, through which a natural stream of water flows, has to have such stream flow from his land unobstructed in its natural channel, unless such right has been curtailed in some legal manner. This is said to be a *natural right.* It is true such rights bear some resemblance to easements, but they are not in fact real easements; for, as every easement is supposed to have its origin in grant, or prescription which presupposes a grant, it would be absurd to suppose that the owner of land at the head of a stream has an easement so acquired for its flow over all the lands of lower riparian owners for many miles to its mouth. The term "natural easements" is indeed often made use of by courts, especially in the case of flowing water, but the preponderating

[1] Day v. Walden, 46 Mich. 575; Riehle v. Heulings, 38 N. J. Eq. 20; Edgerton v. McMullan, 55 Kan. 90.

[2] See Keates v. Hugo, 115 Mass. 204; Muller v. Strickler, 19 Ohio St. 135; Pierre v. Fernald, 26, Me. 436. Compare Powell v. Sims, 5 W. Va. 1; Royce v. Guggenheim, 106 Mass. 201.

[3] Dyer v. Sanford, 9 Met. (Mass.) 395.

opinion seems to maintain the principle that a right of this character is a natural right[1] —an incident of property in the land, not an appurtenance to it.[2]

The fundamental distinction between easements and natural rights seems to be that the former can only be created and acquired by act of man, whereas the latter are inherent in land and arise without any human agency. They do not result from treaty, are not created by any servient owner, and are enjoyed without any act of acquisition.

Natural rights have reference mainly to light, air, water, and the support of land. It is one of the oldest and best known rules of the common law, that every riparian proprietor is entitled to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality,[3] and that no proprietor, in the absence of license, grant, or other right, may use the water to the prejudice of others either above or below him. But as water is the common and equal property of everyone through whose domain it flows, and as each have a right to its reasonable use while passing over his possessions, it follows that the foregoing rule is subject to the limitation that such right must be enjoyed with reference to the rights of others similarly situated, and the exigencies of agriculture, manufacturing and domestic convenience are constantly tending to contract the rule and broaden its qualification.[4]

[1] This statement is not scientifically exact. Strictly speaking *all* rights, as that term is used in jurisprudence, are *legal* rights; that is, rights recognizable and enforcable by law. If a right is incapable of legal enforcement then it ceases to be a right. In practice, however, the term is in general use in the manner indicated in the text.

[2] Johnson v. Johnson, 2 Met. (Mass.) 234; Scriver v. Smith, 100 N. Y. 471. Consult Wash. Easements, 276; Ang. Water-courses, § 90.

[3] See, Village of Dwight v. Hayes, 150 Ill. 273, for a discussion of the right of pollution: also. Robb v. LaGrange, 158 Ill. 21. For discussions of the right of obstruction and diminution; see also, Pillsbury v. Moore, 44 Me. 154; Green Bay, etc. Co. v. Water Power Co., 90 Wis. 370; Ulbricht v. Water Co. 86 Ala. 587; Clark v. R. R. Co., 145 Pa. St. 438.

[4] See, Stein v. Burden, 29 Ala. 127; Garwood v. R. R. Co. 83 N. Y. 400; Pillsbury v. Moore, 44 Me. 154. Sanderson v. Penn. Coal Co., 86 Pa. St. 401; Miss. Mills Co. v.

Under the common law, surface water, like the waters of the sea, was regarded as a common enemy, and every landowner had a right to expel it from his own land without regard to the injury which might thereby be occasioned to another estate.[1] By the civil law a lower proprietor was obliged to receive the surface water which flowed naturally from an upper estate. In this country there is no uniform rule but a majority of the States seem to have adopted or indorsed that of the civil law.[2] Under this rule the owner of a higher tract has a right to have the surface water coming naturally upon his lands pass off through natural drainage upon and over lower lands, and it seems he may even drain his own land, by artificial ditches, into natural channels, even though by so doing the quantity of water thrown upon the lower lands is thereby increased.[3] But, this probably, would be the full extent of the right and in those states where the common law rule prevails he would not be permitted to collect water by any method of artificial drainage and cast it upon the proprietor below.[4]

Light and air resemble each other in many particulars and the rules of law regarding same are for the most part identical. Because of their unstable character they are not the subject of property, as that term is ordinarily understood, but every man has a natural right to use and enjoy them limited only by the natural rights of others.

Every owner is entitled, as a natural right, to support for

Smith, 69 Miss. 299. This rule has been abrogated in several of the Western States as unsuited to the climate and soil of their respective localities. In such states parties are permitted to divert and appropriate water flowing in natural channels for any useful purpose, particularly that of irrigation, and the first appropriator is permitted to maintain such diversion as a distinct property right. See, Reno Smelting Works v. Stevenson, 20 Nev. 296; Coffin v. Ditch Co., 6 Col. 443; Lakeside Ditch Co. v. Crane, 80 Cal. 182.

[1] Mayor v. Sykes, 94 Ga. 30; Mis. Pac. Ry. Co. v. Keys, 55 Kan. 205.

[2] Consult, Gould on Waters, § 265.

[3] Robb v. LaGrange, 158 Ill. 21.

[4] See, Gregory v. Bush. 64 Mich. 37; Davis v. Londgreen, 8 Neb. 43; Kauffman v. Griesemer, 26 Pa. St. 407. As will be seen from the text the rules are conflicting and the student must consult local authorities.

his land from the adjacent and subjacent soil. The doctrine of the right of lateral support is quite ancient, but since it has become settled that land may be divided horizontally as well as vertically the reasons which allowed a lateral support have been held equally applicable to the right of subjacent support. But this right exists only with respect to land in its natural condition.

A proprietor may surrender, extinguish or suspend a natural right to which he is entitled, in which event the surrender or suspension may produce an easement in favor of some other tenement. Thus, A, having a natural right to the passage of water over his land in natural channels to the lands of B, the proprietor below, may grant to B, the privilege of erecting a dam the result of which will be to flood A's land. In such event B's privilege is at variance with A's natural right, which thereby becomes suspended during the continuance of the easement. If, however, the easement is at any time extinguished A's natural right instantly revives. So too, everyone has a natural right to the support of his soil, but this right exists only in respect of land, not of buildings. Yet a right to support for buildings, both from adjacent and subjacent land, may be acquired, and when acquired the right is an easement. Again, while the right to support for land is a natural right yet the owner of the surface may grant to an owner of substrata the privilege of disturbing or lowering the surface as a result of the removal of the subjacent minerals, and the right thus conferred would be an easement.

Public uses.—Some writers have extended the classification of easements to *private* and *public*, the former comprising the matters heretofore shown, the latter those privileges which are common to all. Under the head of easements Kent includes all those privileges which the public may have in the lands of a citizen[1] and it has long been customary to speak of the "public easement" of travel on a highway, or the "public easement" of navigation. These

[1] See 3 Kent Com. 419.

latter, however, Kent classes as *aquatic rights*, while writers of high repute maintain that there can be no easement, in the proper sense of that term, in a public highway.[1]

If we are to regard our first definition of an easement as correct, and upon this point there is no controversy, then there must be both a servient and a dominant tenement in order to create an easement proper and the privilege must be exercised with respect of land. In a public way there is no dominant tenement and while we are accustomed to speak of the use of same as an easement in favor of the public the expression is hardly accurate. In fact a highway is in the exclusive use and occupation of the public for the purpose of passing and repassing; the public, in its organized capacity, controls, improves, and repairs it, whereas in an ordinary easement the occupation remains in the owner of the soil.

At common law every thoroughfare used by the public and "common to all the king's subjects" is a highway, whether same be on land or water. The public have an inalienable right to traverse the highways and navigate the public waters. This right does not come by way of grant but is inherent. We may therefore distinguish between an easement and a *public use.*

Commons.—Another class of incorporeal hereditaments which in some respects resemble easements is known as *right of common.* Originally this right existed between a feudal lord and his tenants, whereby the latter were given certain privileges upon the waste lands of the lord, as to pasture cattle, collect firewood, etc. These were subsequently extended to include other matters and larger numbers of persons. The English doctrine of "commons" does not prevail in this country, though writers on real property are accustomed to give it a place in their books. Possibly some faint survivals may yet be seen in the older states.

Profits a prendre.—Rights exercised by one person in the soil of another, accompanied with a participation in the profits of the land, are termed *profits a prendre.*[2] The

[1] Goddard Easements, 9.

[2] The word is of French origin and means to seize or take; as something taken from the soil.

strict and technical definition of an easement excludes a right to the products or proceeds of land, it being a mere right of convenience without profit; yet it is generally admitted that a right of profits is in the nature of an easement, and, although capable of being transferred in gross, may also be attached to land as an appurtenance, and pass as such.[1] The question does not seem to be altogether well settled, however, as a right of this nature is, on general principles, an interest in the land itself, and hence not properly an easement. It is true it is a privilege, as is also an easement, but the latter is a privilege without profit, and is merely accessorial to rights of property in land, while the former is the reverse.

A profit *a prendre* always contemplates a participation of some kind in the profits of the land. It includes many things that ordinarily pass under the head of license, and, as we have seen, the distinction between it and an easement is not always palpable. Thus, a right of pasture; of mining; a privilege to fish, hunt, etc., are all profits *a prendre*, and when not granted in favor of some dominent tenement cannot be said to constitute an easement in the proper acceptation of that term, but rather an incorporeal right of property in the land itself.[2]

Licenses.—An authority to do some act or series of acts on the land of another, without passing any estate in the land, is called a *license*, and imparts to the *licensee* rights resembling, though not identical with, an easement. A license is said to be *express*, when the authority is granted in direct terms, and *implied*, when same may be presumed from the acts of the party having the right to give it.[3] Licenses are further classified as *executory*, as when the permitted act is continuous or has not been performed, and *executed* when such act has been accomplished.

[1] Huntington v. Asher, 96 N. Y. 604

[2] Post v. Pearsall, 22 Wend. (N. Y.) 425; Waters v. Lilley, 4 Pick. (Mass.) 145.

[3] Thus, if one sells standing timber this would imply a license to the vendee to enter for the purpose of cutting and removing same. Howe v. Batchelder, 49 N. H. 204.

A license may be created by parol, but if it constitutes a permanent right or confers any interest in the land it must be by grant; and when a license is coupled with an interest, by reason of the payment of price or other act, it has been held that the authority conferred is not a mere permission, but amounts to a grant which obliges the grantor and vests legal property in the grantee.[1] It may be said, however, that licenses which, in their nature, amount to a grant of an estate, though for ever so short a time, are properly considered as leases.[2]

A license, being a mere privilege founded in personal confidence, ceases with the death of either party, or with a sale or conveyance of the land, and cannot be transferred by the licensee, while, if executory, it is revocable at any time at the pleasure of the licensor.[3] When executed, in whole or in part, the question of revocation becomes one of great difficulty to properly determine; but usually a court of equity will not permit the revocation of a license where it has been given to influence the conduct of another and has caused him to make large expenditures or valuable improvements.[4]

A license operates as a protection for every act done under it while in force, but after revocation the licensee will become a trespasser and as such may be evicted by the landowner.[5]

The main difference between an easement and a license lies in the fact that the former must arise in grant, while the latter, conveying no estate or interest in the land, may rest in parol; yet the distinction is very subtle, and it becomes difficult in many cases to discern a substantial difference between them. In fact an easement in gross is, in legal effect, a license.[6]

[1] Rerick v. Kern, 14 S. & R. (Pa.) 267; Metcalf v. Hart, 3 Wyo. 513.

[2] Cook v. Stearns, 11 Mass. 536.

[3] De Haro v. United States, 5 Wall. (U. S.) 599; Mumford v. Whitney, 15 Wend. (N. Y.) 380.

[4] Flickenger v. Shaw, 87 Cal. 126; Thomas v. Irrigation Co., 80 Tex. 550; but see, Lawrence v. Springer, 49 N. J. Eq. 289; Dwight v. Hayes, 150 Ill. 273.

[5] Kremer v. Railway Co., 51 Minn. 15.

[6] Consult, Shirley v. Crabb, 138 Ind. 200; Hahn v. Baker Lodge, 21 Or. 30.

Franchises.— In its original form a *franchise*[1] was a royal privilege or prerogative of the king, subsisting in the subject by a grant from the crown; and except that the grant comes from the people in their sovereign capacity, the general features have not been changed in this country. The term is ordinarily applied to grants for the maintenance of bridges, ways, ferries,[2] etc., and frequently such concessions create or confer rights so exclusive in their nature that the State may not interfere with same by the creation of a similar franchise tending to impair their value.[3]

The grant of a franchise creates a vested right, and, unless expressly restricted to the person of the grantee as an individual privilege, is alienable and descendible in the same manner as other real property.[4]

A franchise may cease or be destroyed by a *surrender* on the part of the person holding or entitled to same, or by a *revocation* for misuser or non-user. The latter result follows from the fact that all franchises are granted on the conditions that they shall be duly observed and the duties that may be annexed to same faithfully performed. A franchise may also be terminated by the act of the sovereign when the public welfare may require such action. This follows from the paramount right of the state, which may, and often does, sacrifice private rights for the public good.[5] The state must, as a rule, however, make full and complete indemnity to individuals whose rights are thus invaded, abridged or destroyed.

The creation, duration and extent of franchises are matters of statutory regulation in all the states. In late years they have usually been confined to corporations.

[1] The word means freedom or liberty.

[2] Under the English law the title included a large number of subjects wholly unknown in the United States, as forrest, chase, free-warren, fishery, etc.

[3] 3 Kent Com. 458. But see, Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420.

[4] Dufour v. Stacey, 90 Ky. 288; Chadwick v. Haverhill Bridge, 2 Dane, Abr. 686; Lippencot v. Allendar, 27 Iowa, 460.

[5] As where a toll bridge, erected under legislative authority, is made free.

Burial Lots.—As a rule the purchaser of a cemetery lot takes no title to the soil. The grant is in the nature of a license or privilege to make interments in the described plot, exclusive of others, so long as the ground shall remain in such use.[1] Such right is, however, real property. It may itself be sold and transferred to others, if nothing in the grant prevents, and is to be treated generally as an incorporeal hereditament.

[1] Kincaid's Appeal, 66 Pa. St. 411; Raynor v. Nugent, 60 Md. 515.

CHAPTER III.

ESTATES IN REAL PROPERTY.

Analysis of the fundamental concept of an estate in land, both at law and in equity — The quantity of interest a tenant may possess — The time for which same may be enjoyed — The number and connection of those to whom it may be given — The terms upon which it may be held and the manner of its enjoyment — Trusts and powers — Merger.

Defined and Distinguished.—The specific degree of interest which a person may have in real property is called an *estate*.[1] The owner, or, more properly, the holder, of such interest is technically termed a *tenant*. Thus, if land should be given A to hold for ten years, and after the expiration of that period to B for his lifetime, and after his death to C and his heirs forever, all of these specific interests would be *estates*. In such event A would be a tenant for years, B a tenant for life and C a tenant in fee.

The two main ingredients of estates are *quantity* and *quality*, the former having reference to their duration and extent, the latter to the tenure by which they are held and the manner of their enjoyment. Thus, in the example last given it will be seen that A's estate is of fixed or definite duration; that B's is limited by a circumstance sure to happen and yet indefinite as to time; that C's is practically perpetual, therefore the estates vary in *quantity*, that is, in their duration or the length of time they may exist. Now if A's estate was on condition that he reside upon the land, B's

[1] From the Latin *status*. At first the word meant simply personal condition, as the status of a tenant for life, and for a number of years the medieval lawyers seemed at a loss for some word in which the idea involved in our proprietary calculus could find expression. Finally, through a curious process of evolution, the word estate became definitely employed to signify all kinds of proprietary interests in land.

that he pay ten dollars yearly to C while his estate lasts, and C's upon no condition or restriction whatever, it will be further seen that the estates differ with respect to *quality*. A clear understanding of these fundamental distinctions is essential to the correct study of what follows, for upon them is constructed the entire system of proprietary interests in land.

From the foregoing illustrations we may formulate the definition that, an estate is a proprietary right in land projected on the plane of time and qualified by the manner in which it is to be enjoyed.

Classification of Estates.—Estates are classed as *legal* and *equitable*, the former being those which have their origin and derive their qualities and incidents from the common law, and the latter those which are derived from the rules and principles which prevail in courts of equity. Formerly every estate was legal, in the proper acceptation of that term, and in contemplation of law there is and can be but one estate, which may properly be denominated the legal estate. But the introduction of what were known as uses, and the subsequent origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the court of chancery to take cognizance of the rights of the beneficiary, and thus grew up a double ownership, as it were, of lands so situated. As a rule, any legal conveyance will have the same effect upon an equitable estate that it would have on a like estate at law.

Estates have further been classified by elementary writers as *absolute* and *conditional*, but these terms, although frequently employed, must be regarded only as convenient expressions to denote quality. Conditions may be annexed to any kind of an estate, but do not in themselves constitute estates, nor do they partake of the essential characteristics of same.

At common law estates were highly artificial in their creation and complex in character, but in the United States the nature and quality of estates in land have, as a rule, been formally defined and fixed by statute, and while the common-law system as well as nomenclature has been gener-

ally retained, the common-law incidents have, as a rule, been greatly modified or abolished. But while stripped of their former subtlety the elementary divisions and classifications of estates, as made during the formative period of English land law, will undoubtedly forever remain a part of our own jurisprudence, for notwithstanding that the system is both complicated and artificial, yet, as one learned authority has said, "it is a system complete in all its parts and consistent with technical reason." [1]

For the purposes of clearness and accuracy in the ascertainment of proprietary rights in land, elementary writers, from a very early period, have considered estates under the following heads:

I. With respect to the quantity of interest possessed by the tenant.

II. With respect to the time of the enjoyment of such interest.

III. With respect to the number and connection of the tenants.

IV. With respect to the terms and manner of enjoyment.

The classification applies to either legal or equitable interests, and is, perhaps, the most convenient that has yet been devised. In the following paragraphs an effort will be made to examine briefly the general characteristics of estates under these heads, treating first of estates at law and following with estates regarded by courts of equity.

I. Estates Considered with Respect to the Quantity of Interest Possessed by the Tenant.

Classified and Distinguished.—The *quantity* of interest a tenant may have in land is measured by its duration and extent, that is, by the length of time it may last; and this occasions the primary divisions of estates into

(1) such as are *freehold*, and

(2) such as are *less than freehold.*

[1] Gibson, C. J., in Evans v. Evans, 9 Pa. St. 191.

These terms, though still retained in the nomenclature of of the law, have lost much of their original significance; indeed it may be said that at the present time they are nothing more than arbitrary names, mere "terms of art." It would seem, however, that in the early times in England no freeman would accept an estate to endure for a shorter period than his own life, nor was a person not a freeman allowed to hold land for so long and uncertain a period. Hence, land held for life, or a longer period was said to be "freehold." After a time slavery became extinct and freemen held for short and definite terms, but the old distinction continued to exist and has endured until our own day.

A freehold estate is described in the old books as an interest in lands held by a free tenure,[1] for the life of the tenant, or that of some other person, or for some uncertain period. The test seems to lie in its indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, or may be determined by the volition of another, it is not under the common-law rules, an estate of freehold.

This early division of estates seems to have met the concurrence of later writers on real property, and in many states has received an official recognition by legislative enactment.

1. *Estates of Freehold.*

Freeholds, or estates of indeterminate duration, are in turn divided into estates of *inheritance* or in *fee*, and estates *not of inheritance*, or for *life*. The former being where the

[1] Upon the introduction of the feudal law all lands in England became holden either by a free or base tenure. The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least, and could not be summarily dispossessed, even for the non-payment of his rent or the non-performance of his services; whereas the tenant who held in villenage, or by a base tenure, might be turned out at the pleasure of his lord; the person holding by a free tenure, therefore, was called a freeholder, because he might maintain his position against his lord, and the estate was called a freehold (*liberum tenementum.*) See Cruise, Dig., tit. I, § 16. 1 Prest. Est. c II passim. Digby Hist. Real Prop. 49. Deane's Conv. 33.

interest devolves upon successors without end; i. e. where there is no assignable event, certain to happen, upon which the rights will come to an end; the latter is where the interest does not devolve and the rights terminate on the happening of an assignable but uncertain event. At common law the former was subject to a further division into *absolute* and *limited* estates of inheritance, but this distinction has been abolished in the United States, although a very faint resemblance yet exists, in some states, as will hereafter be shown.

Fee-simple.—Freehold estates of inheritance are usually denominated estates *in fee*,[1] a name borrowed from the ancient land system of England, but of far greater import here than there. An estate, in English law, always contemplates an interest falling short of complete ownership. The fee is regarded as the highest estate—the nearest approach to absolute ownership—which a subject can possess but the ultimate right of property is in the sovereign or over-lord. This is the essential feature which distinguishes all feudal tenures. But, notwithstanding that feudal tenures with all their incidents are unknown in America, the old terms have become so deeply rooted in our institutions that a change in the technical language of the law would only produce inconvenience and confusion, and so the old name which at common law expressed the highest estate held in private ownership has been retained as a designation of the corresponding estate under our own laws.

As used in the United States the term signifies an absolute estate of inheritance, free from any restrictions to particular heirs, and is the largest estate and most general interest that can be enjoyed in land, being the entire property therein. It carries with it the most ample right to the use of the land and confers an unlimited power of alienation.[2] In point of

[1] The etymology of the word "fee" is obscure and has given rise to much controversy. It is a modification of the ancient term *feudom* but concerning the word legal lexicographers are very much divided. It is claimed by some to be a Latin recoinage of a word sprung from an old teutonic root signifying property, and this is probably its true derivation.

[2] Haynes v. Bourn, 42 Vt. 686; Currier v. Gale, 9 Allen (Mass.), 525.

duration it may continue forever. Every other species of estate is formed out of it and is ultimately absorbed into it.

The estate is wholly comprised in the word "fee," although it is customary to describe it as a "fee-simple" or even a "fee-simple absolute." It has been said that the term "simple" was added for the purpose of showing that the estate is descendible to the heirs generally, without restraint to the heirs of the body, etc.,[1] and possibly, if the American estate were identical with its English prototype, this explanation would have significance; but, as a matter of fact as well as law, the addition of the word "simple" adds nothing to the force or comprehensiveness of the term.[2] The estate may be had in incorporeal as well as in corporeal hereditaments.

The creation of the estate was formerly very technical, and was raised only by a grant to a man and his *heirs*. For many years this was the rule in the United States; but more recently the statute has generally abrogated the common-law rule, and every estate in lands which may be granted, conveyed or devised is deemed a fee-simple or estate of inheritance, if a less estate is not limited by express words or created by construction or operation of law;[3] and generally the question of the estate transferred is determined rather by the end sought to be attained by the grantor than by the language employed.[4]

Fee-tail.— As previously stated, estates of inheritance were formerly divided into absolute and limited estates; the former called a *fee-simple*, the latter a *fee-tail*. It would seem that originally donations of land were simple and pure, without any condition being annexed to them. In time, however, it became customary to make grants of a more limited nature by which the estate was restrained to

[1] Wright, Ten. 146; 2 Black. Com. 106; 1 Prest. Est. 420.

[2] Jecks v. Toussing, 45 Mo. 167; 2 Wash. Real Prop. 77.

[3] Leiter v. Sheppard, 85 Ill. 242; Merritt v. Disney, 48 Md. 344.

[4] Hawkins v. Champion, 36 Md. 83; Kirk v. Burkholtz, 3 Tenn. Ch. 425; Brislain v. Wilson, 63 Ill. 173.

some particular heirs of the grantee, exclusive of others, as, to the heirs of a man's body, by which only his lineal descendants were admitted, to the exclusion of collateral heirs, or, to the heirs male of his body, in which event the inheritance was confined to his sons. At first the only effect of these restrictions was to suspend the power of alienation until some person capable of succeeding under the specific designation was in existence. Thus, if the grant was to A and the heirs of his body, he might alienate the land as soon as he had a child, and because the estate was so limited it was called a *qualified* or *conditional*[1] fee. But this right of disposition was displeasing to the great land-owners, who desired to preserve their vast properties intact to their own families, and led to the passage of an act known as the statute *De Donis* whereby the right of alienation, to the prejudice of the issue, was taken away. The general power of disposition being thus permanently restricted the interest came to be regarded as a new kind of estate and was called a *fee-tail*.[2] Under this law the immediate owner, while entitled to the full use and enjoyment of the property, could make no conveyance of same for a period beyond his own life, and those who succeeded to the inheritance were in the same position. He and they were called *tenants in tail* and the land was said to be *entailed* upon them.[3]

The estate therefore is an estate of inheritance, but descendible only to some particular heir of the person to whom it is granted and not to his heirs generally, and will continue as long as there is posterity in the regular order of descent. It determines as soon as it reaches an owner who dies without issue.[4]

[1] That is, the estate was regarded as given to him on condition that he had an heir of his body and when this was accomplished by the birth of issue the condition was regarded as discharged.

[2] From the French, *taillare*, or *tailler*, to cut, or reduce into new dimensions and form.

[3] Consult, 1 Spence, Eq. Jur. 140; 2 Black. Com. 112.

[4] It is usual to divide estates tail into *general* and *special*, the former being where only one person's body is specified, from which the issue must be derived, as "to A and the heirs of his body," the latter is where both parents are

One of the marked characteristics of American law is its abhorence of perpetuities and of all devices calculated to place restraints upon free alienation. This early became manifest in respect to estates-tail; in a majority of the states the estate has been altogether abolished, while in a few it has been so modified that when land is given to one and the heirs of his body begotten, the entail extends only for one degree. Thus the immediate grantee would take a life estate, while the second taker would have the remainder in fee.[1]

It will be seen, therefore, that a freehold estate of inheritance, in the United States, is comprised in the one estate of the fee.

We come now to consider freehold estates *not of inheritance*, of which there is but one kind though assuming a variety of forms.

Estates for Life.—An estate for life, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event, is a freehold interest in lands, both at common law and under the statute. It confers upon the tenant the possession and enjoyment of the land during the continuance of his estate, while the absolute property and inheritance of the land itself is vested in some other person.

Such estates are created in two ways: (1) Either expressly, as by deed or other legal assurance, in which event they are called *conventional* estates, or (2) by the operation of some principle or rule of law, when they are called *legal* estates;[2] but the incidents are much the same in either case.

named, as "to A and the heirs of his body by his wife B." Such estates may be made descendible to all the issue in their order without distinction of sex, or they may be confined to either kind in which case then are distinguished by the terms *estate tail-male* or *tail-female*, and descent in such event must be traced through males or females according to the intent of the donor.

[1] This is a matter of statutory regulation, but the text states the general statutory rule. For an interesting and instructive case on this subject see, Sehndorf v. Cope, 122 Ill. 317.

[2] The estates of Dower and Curtesy are the most familiar examples.

An estate for life may be granted to one person or to several, and when to several it may be limited to endure for their joint lives, or for the life of the survivor; or the grantees may take beneficially in succession; or the estate may be held for the life of a stranger. Whenever lands are conveyed to a man for the term of his own life he is called *tenant for life;* but when he holds for the life of another he is, in technical parlance, *tenant pur auter vie*, while he whose life is the measure of the duration of the estate is styled *cestui que vie.* If a tenant for his own life conveys that estate to another the grantee becomes thereby tenant *pur anter vie.*[1] An estate for the tenant's own life is, in contemplation law, of a higher nature than one held for the life of another.

Estates for life will generally endure as long as the life or lives for which they are granted; but there are estates for life which may determine upon future contingencies before the death of the person to whom they are given. Thus, if an estate be given to a woman so long as she remains single or during her coverture, or so long as a grantee may dwell in a particular place, etc.,—in all these cases the grantees will have estates for life, determinable on the happening of uncertain events.[2]

Sometimes there may be a remnant of a life estate, as where a tenant *pur auter vie* dies before the *cestui que vie.* At common law a very peculiar condition resulted under these circumstances. The land was regarded as practically without an owner for the time being, that is, no one had a legal right to enter. The person holding the reversion, or ultimate estate, had no such right because the previous estate had not expired; neither had the heir of the deceased tenant, for the estate was not one of inheritance, nor could his executors take it because it was a freehold and not a chattel interest, neither could it be devised. As a consequence any one might enter and take possession, and no one having a legal right to the possession such person would

[1] See, 2 Black. Com. 120; Platt on Leases, 679; Clark v. Owens, 18 N. Y. 434.

[2] Jackson v. Meyers, 3 Johns. (N. Y.) 388; Hurd v. Cushing, 7 Pick. (Mass.) 169.

hold the land until the estate determined.[1] The statute has remedied this matter, however, by giving the remnant to either the heir or administrator.

Incidents of Life Estates.—Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits, during the continuance of the estate.[2] He also has the power of alienating his whole interest,[3] or of creating out of it any less estate than his own,[4] unless restrained by positive condition; and while any attempt to create a greater estate than his own must necessarily be void, upon the principle that a man cannot convey that which he does not possess, yet his deed will be effective to pass whatever interest he has.[5]

As a rule a life tenant is bound to keep the premises in repair during his tenancy and can make no permanent improvement at the expense of the inheritance. He must pay or "keep down" the interest on existing incumbrances, but is not chargeable with the payment of any part of the principal.[6] He must discharge all ordinary taxes levied during his tenancy,[7] but charges for what are known as "betterments," or general improvements of a public character which permanently increase the value of the premises will usually be equitably apportioned between the life tenant and the tenant in fee.[8]

Incident to estates for lives, and to a large extent also to estates for years, is the right of a tenant to what are technically known as *estovers*,[9] or the right to cut wood from

[1] These conditions produced what was known in the English law as a title by *occupancy*.

[2] Coke, Litt. 55a; 2 Black. Com. 122; McCormick v. McCormick, 40 Miss. 763; Stewart v. Doughty, 9 Johns. (N. Y.) 108.

[3] Roseboom v. Van Vechten, 5 Denio (N. Y.), 414.

[4] Jackson v. Van Hoesen, 4 Cow. (N. Y.) 325.

[5] Stevens v. Winship, 1 Pick. (Mass.) 318; Rogers v. Moore, 11 Conn. 553; Dennett v. Dennett, 40 N. H. 505. This is a statutory rule in a majority of the states.

[6] Doane v. Doane, 46 Vt. 495.

[7] Prettyman v. Walston, 34 Ill. 192; Jenks v. Horton, 96 Mich. 13.

[8] See 1 Wash. Real Prop. 124; 1 Story Eq. § 487.

[9] The etymology of this word is obscure. Blackstone derives it from the French *estoffer*, to furnish. (2 Black. Com. 35.) It is called *botes* in Saxon and is

the premises for fuel or for use upon the grounds.[1] These estovers, however, must be reasonable in quantity or amount, and must be used by the tenant on the premises. Another important right incident to life estates, and generally all other estates of uncertain duration, is that of *emblements*, or those crops which are the growth of annual planting and culture.[2] These the law gives to the tenant after the expiration of his estate in his own lifetime, or to his administrator in case of his death, as a compensation for the labor and expense of tilling the land. To entitle the tenant to emblements, however, the estate must be terminated in some manner other than by his own act, for the law will not protect him against the consequences of his act if he voluntarily puts an end to the estate.[3] So too, if he knows when his estate is to cease, and plants crops which will not ripen during the term, it is his own folly, and the reversioner will take the land with its increment.[4]

On the other hand, the tenant is restricted from committing *waste*, or doing that which tends to injure or impair the value of the inheritance. Waste is described as *voluntary*, as where some act is performed which impairs the value of the fee;[5] or *permissive*, as where, by the omission of some duty, an injury results to the inheritance.[6] Thus,

divided into three sorts; house bote, plough bote and hay bote. Where several persons have the same right from the same estate it becomes a common of estovers.

[1] Hubbard v. Shaw, 12 Allen (Mass.), 122; Smith v. Jewett, 40 N. H. 532. Calvert v. Rice, 91 Ky. 533. Lynn's Appeal, 31 Pa. St. 44.

[2] Stewart v. Doughty, 9 Johns. (N. Y.) 108; Penhallow v. Dwight, 7 Mass. 34.

[3] As where a widow, holding land during her widowhood, remarries and thereby terminates her estate. Hawkins v. Skeggs, 10 Humph. (Tenn.) 31.

[4] Kittredge v. Woods, 3 N. H. 506; Chandler v. Thurston, 10 Pick. (Mass.) 205.

[5] At common law voluntary waste consists chiefly (1) in felling timber trees; (2) pulling down houses; (3) opening pits or mines; (4) changing the course of husbandry; (5) destroying heir looms. See, Jackson v. Brownson, 7 Johns. (N. Y.) 227; Pynchon v. Stearns, 11 Met. (Mass.) 304; 4 Kent. Com. 76.

[6] Sackett v. Sackett, 8 Pick. (Mass.) 312; Proffitt v. Henderson, 29 Mo. 327; McGregor v. Brown, 20 N. Y. 117. Gaines v. Mining Co. 33 N. J. Eq. 603. Duncombe v. Felt, 81 Mich. 332.

if the tenant were to tear down a house on the premises, this would be voluntary waste; if he should simply suffer it to decay for want of necessary repair, this would be permissive waste. Where the waste results from overruling power, or as commonly termed, the act of God, the tenant will not be held responsible; as where a house is demolished by a tempest, but should the house be only injured, as where it is unroofed, then the tenant must repair it. So too, at common law, the life tenant was not answerable for damages by fire, wither same was occasioned by accident or negligence,[1] but the later doctrine would seem to be that, while inevitable accident will excuse, the consequences of negligence are the same in this class of cases as in others, viz: that the offending party is held responsible for all its natural and probable results.[2]

It is not an uncommon practice to grant estates to persons for their *natural* lives, and this term is frequently employed in creating life estates by will. The expression grew out of conditions which formerly prevailed in England when it was customary to limit estates for life in this manner lest the civil death of the donee might terminate the estate.[3] At present, and in the United States, the expression is practically without meaning, as we have no civil death.[4]

The foregoing applies to all life estates, whether conventional or legal. The creation of conventional estates will be fully considered in the subsequent chapters on conveyancing; the creation and operation of legal estates will form the subject of the paragraphs immediately following.

Dower.— Among the life estates derived from the common law is that which a widow acquires, through operation of law, in a certain portion of her deceased husband's lands,

[1] Cruise Dig. Tit. III Ch. 2.

[2] Clark v. Foot, 8 Johns (N. Y.) 431; and see 4 Kent. Com. 82. It would seem that the doctrine of permissive waste has never been carried as far in this country as in England. Consult, Moore v. Townsend, 4 V room (N. J.) 284.

[3] Wms. Real Prop. 103; Wash. Real Prop. 117.

[4] The subject, in many of its phases, is exhaustively discussed in Avery v. Everett, 110 N. Y. 317.

for her support and maintenance. This estate is known as *dower*, and is said to have been derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but that the husband should allot a part of his property for her use in case she survived him.[1] From an early day this seems to have been a part of the common law of England, receiving frequent mention in the royal charters and concessions, and at Littleton's time had assumed much the same condition that it retains today.[2]

But the common-law right of dower no longer exists in the United States, the rights of the surviving wife in the real estate of her deceased husband being those created by statute alone, and whatever incidents may have attached to the ancient estate have either been swept away or incorporated in the rights derived under the statute. No uniform measure, either as to quantity or quality, has been adopted; but in the main the estate conferred upon the widow conforms to that of the common law, and consists of the use, during her life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.

This includes hereditaments of all kinds, incorporeal as well as corporeal. It is essential, however, that the estate of the husband should have been one of *inheritance* as the estate of dower is but a continuance of the estate of the husband and of course must be one which can extend beyond his life.[3] Nor can the wife claim dower in a term *for years*, however long it may continue, for such term goes to the administrator and not to the heir.[4] So too, it has

[1] Cruise Dig. Tit. VI. Maine ascribes the existence of dower to the influence and exertions of the church. See Maine's Anc. Law. 224.

[2] Coke, Litt. 11a; 2 Black. Com. 135.

[3] See Gorham v. Daniels, 23 Vt. 611, for a case of dower in a husband's life estate.

[4] Local statutes may vary this rule but ordinarily length of time is immaterial. Thus in one case it was held that an estate for 999 years in the husband did not entitle the wife to dower therein. See, Goodwin v. Goodwin, 33 Conn. 314.

been held that the husband must have been actually *seized* of the estate, and hence if he had only a reversion or a remainder in land, the present possession being held by a life tenant, notwithstanding his remainder was in fee his widow would have no dower therein.[1] Further, it must be an interest which the husband held in *exclusive right*, and not jointly, for from the nature of the estate of joint tenants no right of dower attaches in favor of either of the tenants which a wife can enforce.[2] It was formerly held that the husband's estate must be a legal one and that no dower attached to equitable estates. Indeed one of the methods by which men evaded dower was by procuring a conveyance to a trustee for the use of themselves and heirs. But this rule no longer obtains and a wife may be endowed of either legal or equitable estates.[3] Finally, the estate must have been held by the husband in *his own right* for notwithstanding he may have been legally seized yet if he but held in trust for another his widow can claim no dower.[4]

Creation and Termination of the Right.— During the life-time of the husband the wife has only an *inchoate right*, which is not an estate in the land, but a mere contingent interest that attaches to the land as soon as there is the concurrence of marriage and seizin.[5] This interest becomes fixed and certain upon the death of the husband, when it is said to be *consummate*, and after it has been admeasured and assigned it develops into a freehold estate in the property specifically alloted.[6] During the coverture the wife's inchoate right of dower is incapable of being transferred or released, except to one who has already had, or by the same instrument acquires, an independent interest in the land.[7]

[1] 1 Wash. Real Prop. 195; 4 Kent Com. 39; and see, Eldridge v. Forrestal, 7 Mass. 253. Consult local statutes.

[2] Maybury v. Brien, 15 Pet. (U. S.) 21.

[3] Akins v. Merrill, 39 Ill. 62; Dubs v. Dubs, 31 Pa. St. 154. Consult local statutes.

[4] Powel v. Monson, 3 Mass. 364.

[5] Witthaus v. Schack, 105 N. Y. 332.

[6] Elmdorf v. Lockwood, 57 N. Y. 322; Johnson v. Montgomery, 51 Ill. 185; Sutherland v. Sutherland, 69 Ill. 481.

[7] Robinson v. Bates, 3 Met. (Mass.) 40; Tompkins v. Fonda, 4 Paige (N. Y.), 448.

Nor is this right such an interest as can be leased or mortgaged;[1] neither can a married woman bind herself personally by a covenant or contract affecting her right of dower during the marriage.

No act of the husband alone, during the marriage, can bar or extinguish this interest; but a woman may be barred of her dower by *jointure*, which is an allowance settled upon her before marriage[2] in lieu of dower, or by *joining with her husband* in a deed of conveyance, properly acknowledged. The release of dower which a woman makes by joining with her husband in a conveyance of his land operates against her only by estoppel, however, and can be taken advantage of only by those who claim under that conveyance;[3] and if the conveyance is void, or ceases to operate, she is again clothed with the right which she has released.[4] But in all cases where the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against him, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished for all purposes and as to all persons.[5]

Under certain circumstances a woman may be entitled to dower although in strict legal contemplation not a widow, as when a wife has procured a divorce from her husband for his misconduct. In this event she may be allowed dower on his death in such lands as he owned during the period of the marriage relation. So too, a divorce from the wife by the husband for her misconduct will generally bar her dower in his lands.[6]

Upon the death of the husband the inchoate right of the wife, acquired by the marriage, becomes absolute; yet she

[1] Croade v. Ingraham, 13 Pick. (Mass.) 33.

[2] This is accomplished by what are usually termed "marriage settlements."

[3] Mallony v. Horen, 49 N. Y. 111; French v. Crosby, 61 Me. 502; Locket v. James, 8 Bush. (Ky.), 28.

[4] Hinchliffe v. Shea, 103 N. Y. 153.

[5] Elmdorf v. Lockwood, 57 N. Y. 322; Welch v. Dutton, 79 Ill. 465.

[6] Consult local statutes, and see VanCleaf v. Burns, 118 N. Y. 549.

has no estate in the lands of her deceased husband until her dower has been *admeasured* and *assigned*,[1] and her rights therein can only be released to the owner of the fee or to some one in privity with the title by his covenants of warranty. After assignment the widow acquires an estate of freehold in the land allotted in severalty, and her life estate therein possesses all the attributes of other estates for life, including the right of alienation.[2]

Curtesy.— Another life estate derived from the common law is that which a husband acquires in his wife's lands by reason of the marital relation, called an estate by the *curtesy*. Notwithstanding that this estate is derived from the common law it is not peculiar to England, but may be found, more or less modified, in the ancient laws of the other parts of the British islands, and the northern continental nations. The full title of this ancient estate was "estate by the curtesy of England," and was so called for the reason that, unlike dower, it was not regarded as resting upon any moral foundation, and was therefore granted as a simple curtesy or favor of the law of England.[3]

Originally this estate was raised only when the husband had issue by the wife; for before that event he had only an estate during their joint lives. But from a very early period the rule seems to have prevailed that a husband who had issue should retain the lands of his deceased wife during his own life, and when the customs of the Normans were reduced to writing this law was inserted among them.[4]

After birth of issue the husband's right to curtesy is said to be *initiate* and upon the death of the wife the estate becomes *consummate*. It is then regarded the same as any

[1] Johnson v. Montgomery, 51 Ill. 185.

[2] Hoots v. Graham, 23 Ill. 81.

[3] 2 Black. Com. 126; Coke, Litt. 30a. The origin of the name is involved in much doubt. From the fact that it appears to be connected with *curia* (court) it has been surmised that it may have had reference to the attendance of the husband at the lord's court, or possibly that under the circumstances mentioned in the text the husband was acknowledged tenant by the courts of England. See Digby Hist. Law of Real Prop. 173.

[4] Probably during the reign of Henry I.

life estate, carrying with it the same rights and subject to the same duties and disabilities.

While the right of the husband as tenant by the curtesy has been expressly given by statute in some of the states, and incidentally recognized as an existing legal estate in others, yet in a majority of them tenancy by the curtesy has been abolished, the husband being given a statutory allowance from the deceased wife's estate, the quantity and quality varying in different jurisdictions. In many states the husband and wife are made statutory heirs to each other; and in such cases the husband takes the same share in the deceased wife's estate, which she would, on surviving, take in his. In others the estate has been reduced to extremely meager proportions, and accrues only in such lands as the wife owned at the time of her death, and of which she had made no valid disposition by last will and testament.[1]

Nor is it longer necessary that there should be birth of issue to raise the estate, and marriage, without respect to issue, is sufficient to confer the right, if recognized at all.

Homestead.—To the estates derived from the common law the statute has added another, which, in its essential characteristics, has no analogy in the law. It is called a *homestead*, and is usually a constitutionally guaranteed right annexed to land, whereby the same is exempted from forced sale under execution for debt. The main features and object of the homestead exemption are the same in all of the states, but the provisions relative to the character and area of the land thereby affected, both as to value and quality, differ materially.

In many—perhaps a majority—of the states the homestead right is but a mere privilege of occupancy against creditors, the continuance of which depends upon the continuance of prescribed conditions;[2] but in others it has been raised into an estate, limited only as to its value, and not by

[1] Consult local statutes. There is no uniformity of rule in regard to this estate even where recognized.

[2] Casebolt v. Donaldson, 67 Mo. 308; Drake v. Kinsell, 38 Mich 232; Barker v. Dayton, 28 Wis, 368.

any specific degree of interest or character of title in the particular property to which it attaches.[1] In such cases, where the worth of the property does not exceed the statutory valuation, the estate practically embraces the entire title and interest of the householder therein, leaving no separate interest in him to which liens can attach or which he can alien distinct from the estate of homestead.[2] Homestead exemption laws are strictly in derrogation of the common law and constitute one of the most marked innovations of recent years. The leading object is to protect and preserve the home for the benefit of the family; to provide a place of refuge in case of financial misfortune, and to guard the wife and children against the negligence and improvidence of the husband and father.[3]

Prof. Washburn has classified homesteads under the head of "estates by marriage"[4] and several other writers, following his example, have done the same. The classification is not a happy one, however, as the estate is usually given to any person, "being the head of a family," whether married or unmarried.[5] The exemption is designed as a protection to the family and the fact of marriage, although important, is only an incident.[6]

So far as the estate bears resemblance to the common-law estates, its general features are more nearly allied to estates for life; and modern writers, whenever an attempt has been

[1] See Kerley v. Kerley, 13 Allen (Mass.), 287; Burns v. Keas, 21 Iowa, 260; Barney v. Leeds, 51 N. H. 272.

[2] Merritt v. Merritt, 97 Ill. 243. And see Allen v. Cook, 26 Barb. (N. Y.) 374; Locke v. Rowell, 47 N. H. 49; Folsom v. Carli, 5 Minn. 337; Smith v. Estell, 34 Miss. 527.

[3] Parsons v. Livingstone, 11 Iowa 106; Keys v. Hill, 30 Vt. 759; Bucher v. Baldy, 7 Mich. 506.

[4] See 1 Wash. Real Prop. 342.

[5] See Bank v. Guthrey, 127 Mo. 189.

[6] An unmarried person may be and often is the head of a family, and it is not necessary that the relation of either husband and wife or parent and child should exist in order to constitute a family having a head, within the meaning of the homestead law. See, Moyer v. Drummond, 32 S. C. 165; Arnold v. Waltz, 53 Iowa 706; Wade v. Jones, 20 Mo. 75.

made to definitely locate it, have usually classed it in that category.[1]

The estate of homestead, having been raised by law in furtherance of public policy[2] as a protection to the family, is personal in its character, and exists only in favor of one who already possesses some other recognized estate in the land. It is therefore incapable of alienation except in connection with other interests, but when so joined may be a proper subject of sale, mortgage, or release. The interest of the householdor, if a married man, is always shared by the wife, and her consent, as manifested by a participation in the act of conveyance, is always necessary to complete the devolution of title.[3]

The estate or right may be lost or waived by non-user and abandonment,[4] for, as general rule, occupation is an essential element,[5] but a mere temporary absence will not entail a forfeiture;[6] nor will a removal ordinarily be sufficient to terminate the right until a new homestead has been acquired elsewhere.[7]

2. *Estates Less than Freehold.*

Defined.—Where the quantity of interest possessed by the tenant is of a determinate character, either by express limitation or through the volition of some other person, it lacks the essential feature of a freehold, and, although an interest in land yet partakes to some extent of the nature of personalty. Hence estates of this kind are usually denominated *chattels real.* The English writers enumerate five species, but in this country they are practically of three sorts, to wit: (1) for years; (2) at will; and (3) by sufferance.

[1] See 1 Wash. Real Prop. 342.

[2] Robinson v. Wiley, 15 N. Y. 494.

[3] Hutchins v. Huggins, 59 Ill. 33; Size v. Size, 24 Iowa, 580; Dearing v. Thomas, 25 Ga. 224; Pipkin v. Williams, 57 Ark. 242; O'Malley v. Ruddy, 79 Wis. 147.

[4] Green v. Marks, 25 Ill. 221; Dunton v. Woodbury, 24 Iowa, 76; Tillotson v. Millard, 7 Minn. 520.

[5] See, Ingels v. Ingels, 50 Kan. 755.

[6] Tomlinson v. Swinney, 22 Ark. 400; Holden v. Pinney, 6 Cal. 234; Austin v. Swank, 9 Ind. 112.

[7] Woodbury v. Luddy, 14 Allen (Mass.) 1; Thoms v. Thoms, 45 Miss. 275.

For the reasons which have placed estates of this kind so far beneath the dignity of a freehold when in point of fact they often exceed it, both in quantity and quality, we must look to the feudal policy which prevailed during the period when the principal rules of the common law were fixed. Determinate estates were held only by the inferior classes of society—usually agriculturists; as a rule they were held by men in an abject state of slavery, to whom the will of the superior was law. The persons, property, and even the lives of these men were under the control of their lords, and their proprietary rights, being thus so fully under the power of their masters, were regarded as of little or no value.[1] In the progress of civilization the so-called chattel interests have developed into an importance often equal to the fee but while the old reasons therefor have long since passed away, the old rules which fix the status of these estates have remained.

Estates for years.—An interest in land for a fixed or ascertained period is called an estate *for years*. This is the best known and most widely employed of the estates less than freehold. In the earlier stages of the estate it would seem to have been a mere concession made to the cultivators of agricultural lands belonging to the great lords, who, in order to encourage such tenants in the practice of good husbandry, finally gave them permanent interests. The ancient legal doctrine, based upon the feudal systems, regarded this relation of landlord and tenant simply as one of personal contract, hence the tenant had no estate in the land but only a personal claim against the landlord to be allowed to occupy same pursuant to the agreement. The interest thus acquired being regarded simply as a personal privilege, it followed that the only persons who could claim the benefits of the concession, on the death of the tenant, were his executors and administrators. At a comparatively early period a change was effected whereby the tenants' interest came to be regarded as property, and not a mere right to the

[1] See Burton Real Prop. 39; Preston Est. 604; Wharton's Conv. 68.

performance of an agreement. If he was evicted he might sue for and recover the land, either from the landlord or a stranger, and was not compelled to seek redress in an action against the landlord on the contract; in other words his interest became a real property—an estate—and has been so regarded in England for many years. Yet owing to the peculiar features of the English land system and the operation of laws relating to the old tenures, the personal character of the estate, although it was an anomaly, was never abandoned, and leasehold estates have continued to be classed with personalty under the mongrel name of "chattels real." In America the tenant's interest has always been regarded as property and never as a mere contractual right, but old ideas and strongly rooted conventionalities are hard to overturn and so estates for years, though strictly real property, will doubtless continue to be treated as chattels.

While the estate for years was formerly characterized by numerous subtleties and refinements, yet in its modern aspects, particularly as created in the United States, it is simple in form and popular in use, and, with the exception of the fee, is the most common estate known to our law. In its essentials it is a right to the possession and profits of land for a certain specified time, called a *term*,[1] and, unlike estates for life, is never created by operation of law, but always by the act or contract of the parties. It is inferior in rank to a life estate, however long it may last, and, not rising to the dignity of a freehold, is at best but a chattel interest.[2] It is created and perfected by the execution and delivery of a deed or *lease* for the term,[3] and in this respect differs materially from the old estate of the English law, which, for its consummation, required an actual entry.[4] It may be created

[1] From the Latin *terminus*, an end.

[2] See 2 Kent, Com. 342; 1 Wash. Real Prop. 310; 1 Platt, Leases, 3.

[3] 4 Kent, Com. 97; Den v. Johnson, 3 Green (N. J.), 116; Allen v. Jaquish, 21 Wend. (N. Y.) 635. A lease for one year may generally be created by parol.

[4] Before entry the lessee had only a right of entry, called in law *interesse termini*, or, an interest in the term. Wms. Real Prop. 395.

either with or without a reservation of rent, but usually the payment of rent is the essential condition upon which the estate is held. In the absence of stipulation the amount payable is presumed to be equivalent to the annual value of the lands occupied but it is now the universal practice for the parties themselves to agree upon the sum to be paid.[1] It may be limited to commence presently or *in futuro*,[2] and, unless restricted by the terms or conditions of the grant, may be sold and assigned the same as other real property.[3]

Extent and Character of the Estate. — An estate for years embraces every kind of a demise of lands where the period is definite and certain. Thus the term may be for a fixed number of days, weeks or months, as well as for a year or any number of years. It confers no ownership in the soil but does carry a right to the possession and profits thereof and to all of the proper uses that can be made of it during the term, subject to such limits as may be fixed by the agreement of the parties or are implied by law from the nature of the estate. Within these limits the estate of a tenant for years ranks with that of a freeholder in regard to stability of enjoyment.[4]

Rights and Duties of Tenant.—A tenant for years, like a tenant for life, is entitled to estovers and in like manner as a life tenant is restrained from committing any kind of waste. Where the determination of the estate is certain, or where it is determined by the act of the tenant himself, he will not be entitled to the emblements.[5] But where the determination depends upon an uncertain event; as where a tenant for life lets land for years, or where a term for years is made determinable on the happening of a particular event, then the tenant will be entitled to emblements in the same manner as a life tenant.

[1] See, Deane's Com. 51. Gilbert, Rents, 9.

[2] Whitney v. Allaire, 1 Comst. (N. Y.) 305.

[3] Wms. Real Prop. 414; Robininson v. Perry, 21 Ga. 183.

[4] Riddle v. Littlefield, 53 N. H. 510; Freer v. Stotenbur, 36 Barb. (N. Y.) 642; and see, 1 Wash. Real Prop. 437.

[5] Whitmarsh v. Cutting, 10 Johns (N. Y.) 300.

Duration of Term.—In the absence of any statutory rule to the contrary the estate may be for any number of years. In the case of agricultural lands leases are usually restricted by statute to short periods[1]—twelve or fifteen years—but with this exception there is no legal limit to the extent of time for which a lease may be granted provided the term be definite with respect to its commencement and the number of years it is to last is certain. Building leases are frequently made for ninety-nine years and there is no technical difficulty in practically making them perpetual.

How Ended.—An estate for years may be terminated by *expiration* of its own limitation, by a *surrender* of the term prior to that event, by *forfeiture* for condition broken, and in some instances by *merger*.[2]

Being but chattel interests, estates for years do not descend to the heir of the person last seized or possessed of them, but vest in the executor or administrator of the deceased in the same manner as other chattels, and this without regard to the length of the period they may cover.[3]

Right of Distress.—There is an ancient and peculiar incident in the relation of landlord and tenant the origin of which legal historians have as yet been unable to fully explain. This is the right which the landlord has to enforce the payment of rent by a seizure and detention of his tenant's chattels, or, as it is technically called, the right of *distress*.

It is said that early records, both of English customs and those of kindred nations, point to a time when distress was the almost universal form of civil remedy. When cattle constituted the only movable property of any value, and courts of justice had no swift or certain means of enforcing their orders, the most natural thing for a man to do, who complained of wrong at his neighbor's hands, was to drive off some of the wrongdoer's cattle and hold them until reparation should be made. By steps, of which nothing certain is known, it came to be understood that an agreement for the

[1] Consult local statutes.

[2] 1 Wash. Real Prop. 546.

[3] Chapman v. Gray, 15 Mass. 445; Murdock v. Ratcliff, 7 Ohio, 119.

occupancy of lands, though it created no feudal tenure, and therefore no service in the proper sense, entitled the owner, if the rent fell into arrear, to seize any goods he could find on the land as security for the payment, and so the right to distrain without judgment developed and became fixed apparently without dispute.[1]

The remedy has been generally recognized in the United States, modified, however, by statute, but in several states it has been either abolished or superseded by other remedies.

Estates at will.—A tenant at will is one who has no sure or certain estate, but holds at the pleasure of his lessor, who may, at any time, dispossess him.[2] The interest of a tenant at will is the most precarious that can be had in real property, and because the lessor may determine his will and oust the tenant whenever he pleases, such tenant possesses nothing that can be granted by him to a third person.[3]

An estate at will is determinable at the will of either party, notwithstanding that by the agreement creating same it is expressed to be at the will of one party only, and any act or declaration indicative of the intention of determination by either will be sufficient to put an end to it.[4] So too, the death of either party *ipso facto* terminates the tenancy.[5] If the lessor dies the lessee becomes a tenant by sufferance.[6]

A tenant at will is entitled to estovers, and, if the tenancy is terminated by the landlord, to emblements. He is not technically chargeable with waste, but may, in some cases, be treated as a trespasser, having forfeited his estate.[7]

[1] See Pollock Land Laws, 145; 3 Black. Com. c. 1. It is suggested by Pollock that it may have contributed to the readier allowance, as it certainly does to the apparent justice of the proceeding, that in the middle ages the live stock of the farm were mostly supplied by the landlord. In such case, if the tenant became insolvent, a landlord who seized stock was only resuming his own.

[2] Coke, Litt. 55a; 2 Black. Com. 265; 2 Wash. Real Prop. 580.

[3] See King v. Lawson, 98 Mass. 309; Reckhow v. Schanck, 43 N. Y. 448; Dingley v. Buffum, 57 Me. 381.

[4] Rising v. Stannard, 17 Mass. 281; Doe v. Richards, 4 Ind. 374.

[5] Cody v. Quaterman 12 Ga. 386; Robie v. Smith, 21 Me. 114.

[6] Reed v. Reed, 48 Me. 388.

[7] Phillips v. Covert, 7 Johns. (N. Y.) 1; Local statutes may effect the doctrine of the text.

Estates at will, however, in the strict and technical sense of the term, have well nigh become extinguished under the operation of judicial decisions and legislative enactments, and the tendency of the law has been to construe such estates into tenancies from year to year, or even from month to month, the character of the land and the reservation of rent having much to do with shaping the term. In almost every instance a notice to quit is now necessary to determine a right of occupation, and the length of notice is quite generally fixed by statute, special reference being had to the nature of the contract of entry and the character of the property.

Estates by Sufferance.—The term "at will" and "by sufferance" are very frequently employed in conjunction to indicate any estate of indeterminate duration depending solely on the pleasure of the landlord. As a matter of law, however, the conditions which they represent are entirely dissimilar. A tenant by sufferance, technically speaking, is one who, having been originally lawfully invested, continues to hold over after the determination of his estate, and is by the owner suffered to remain in possession.[1] The fundamental distinction between an estate at will and one by sufferance is, that in the former, the tenant having acquired possession by the consent of the owner, there is between them a privity of estate; in the latter, being much in the nature of a trespass, there is none. Such a tenant is not strictly a trespasser, however, his position being that of one who came in rightfully but who continues to hold without right. No act of the tenant alone can change this relation but any recognition by the owner, or any act indicating his assent to the continuance of the holding will convert the occupant into a tenant at will; and usually if a tenant holding over after the expiration of his term pays rent to the landlord, which is accepted, he will hold by implication of law on the same terms which were specified in his lease.[2]

[1] 2 Black. Com. 150; 2 Wash. Real Prop. 616; 4 Kent Com. 116. Russell v. Fabyan, 34 N. H. 218; Livingston v. Tanner, 12 Barb. (N. Y.) 481.

[2] Schuyler v. Smith, 51 N. Y. 309.

It is said that this species of tenancy was originally a mere device to prevent a tenant, who had lawfully acquired possession, from afterwards setting up a title in himself by adverse possession, and thus defeating the title of his landlord.[1]

Tenants by sufferance were not liable at common law to pay any rent, because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate;[2] but the statute has generally reversed this, and as a penalty for withholding the property imposes upon the tenant double rent.

This class of tenants includes practically all persons who continue in possession, without agreement, after the determination of the particular estate by which they originally acquired same,[3] and this without reference to the fact that the original contract may have provided for the recovory of rent should the tenant hold after the expiration of his lease.[4] It has been held to include tenants for years whose terms have expired; tenants at will whose estates have been determined; grantors who have agreed to deliver possession by a certain day, and hold over; under-tenants holding after the expiration of the term of the first lessee; and generally all others who having rightfully come into possession continue to hold when such right has expired.[5]

Occupation Without Estate.—In all of the various forms of estate which we have just considered it will be seen that the essential element is a right of use and occupation, yet there may be a lawful occupancy of land without any estate in the occupier. Thus, it is a common practice in many localities to cultivate land "on shares," that is, one person contributes the use of land while another plants and

[1] Smith's Land. & T. 31.

[2] Cruise Dig. Litt. IX; 4 Kent Com. 116.

[3] See Uridas v. Morrell, 25 Cal. 35; Keay v. Goodwin, 16 Mass. 1.

[4] Edwards v. Hale, 9 Allen (Mass.) 462.

[5] See 2 Wash. Real Prop. 617; Coke, Litt. 57b; Smith's Land. and Ten. 25; Jackson v. Parkhurst, 5 Johns. (N. Y.) 128; Benedict v. Morse, 10 Met. (Mass.) 223; Smith v. Littlefield, 51 N. Y. 543.

cultivates the crop, which, when harvested, is divided between them. At first glance this looks like some form of an estate for years. Such occupancy, however, does not constitute a tenancy for years on the part of the cultivator. At best he is only a tenant in common of the crop, which, as we have seen, is usually regarded as personalty, and the legal possession of the lands, except so far as may be necessary to enable him to cultivate and harvest the crop, is in the owner.[1]

So, too, where one occupies land as the servant of another, as where an agricultural laborer for the more convenient performance of his duties is permitted by the owner to live upon a certain portion of a farm or plantation, no estate is raised by such occupancy. The occupier is neither a tenant for years, at will, or by sufferance, and while it is true that he is in rightful possession, yet such possession, in contemplation of law, is the possession of the master.[2] And generally, a grant which merely gives to the grantee a right to use the premises for a specific purpose, the grantor or owner retaining possession of same, confers no interest in the land and consequently raises no estate in the grantee. In all grants of this character, that is where possession is given for a special purpose, the transaction is treated as a license which ceases whenever the special purpose is accomplished.[3]

II. Estates Considered with Respect to the Time of Their Enjoyment.

Defined and Classified.— With respect to the time of their enjoyment, estates are classed as *in possession* or *in expectancy*, the former being where the tenant is entitled to immediate enjoyment, the latter where the right to such

[1] Bradish v. Schenck, 8 Johns (N. Y.) 151; Aiken v. Smith, 21 Vt. 172.

[2] Haywood v. Miller, 3 Hill (N. Y.) 90; Kerrains v. People, 60 N. Y. 221. The student is referred to the remarks in the first chapter on the characteristics of possession, particularly to that part relating to *constructive* possession, see p. 19 *ante*.

[3] See Funk v. Haldeman, 53 Pa. St. 229; Silsby v. Tratter, 29 N. J. Eq. 228; Bates v. Duncan, 64 Ark. 339.

enjoyment is postponed to some future day. To the former it is unnecessary to further advert. Estates in expectancy, or, as they are sometimes called, *future estates*, are divided into estates in *remainder* and estates in *reversion*, the nature and characteristics of which will form the subject of succeeding paragraphs.

Estates in Remainder.—A *remainder* may be defined as an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.[1] As, if a person seized of the fee of lands grants them to A for twenty years, and after the determination of that period or term to B. and his heirs. In such event A would be tenant for twenty years, with remainder to B in fee. It will be observed, in the supposed case, that an estate for years is carved out of the fee and given to A, and the residue or remainder of the estate is given to B. Yet, in contemplation of law, both of these tenances constitute but one estate, each being a separate part of the whole. Both were created out of the same freehold estate of inheritance, and both subsist at the same time, the one in possession, the other in expectancy, the two when added together being equal only to one estate in fee.[2]

Estates in remainder are either *vested* or *contingent*, the former being where there is an immediate fixed right of future enjoyment, the latter where the right of enjoyment is to accrue on an event which is dubious or uncertain.[3] In the former a present interest passes to be enjoyed in the future; in the latter no interest passes, and the limitation may never become effective.[4] Thus, in the case which has just been considered, the remainder became vested in B at

[1] Coke, Litt. 143a; 2 Black. Com. 163; Booth v. Terrell, 16 Ga. 20; Brown v. Lawrence, 3 Cush. (Mass.) 390.

[2] Consult 2 Black. Com. 163; 1 Wash. Real Prop. 535; Wms. Real Prop. 208.

[3] Howard v. Peavey, 128 Ill. 430; and see Watson v. Smith, 110 N. C. 6.

[4] See Brown v. Lawrence, 3 Cush. (Mass.) 390; Price v. Sisson, 13 N. J. 176; Moore v. Lyons, 25 Wend. (N. Y.) 144; Croxall v. Shererd, 5 Wall. (U. S.) 288.

the moment of the creation of the precedent estate in A, and could not be defeated. But if a grant is made to A, to hold until C returns from Rome, then to B and his heirs, this would be a contingent remainder, for the estate upon which the expectant interest is limited to take effect, is determinable on an event which may never happen.

The law favors vested estates and a remainder will never be construed as contingent when it may, consistently with intention, be deemed vested.[1] The test lies in the uncertainty of the right of enjoyment, not in the uncertainty of actual enjoyment, for this latter may be incident to many grants of this character. Thus, a grant to A for life, remainder to B and the heirs of his body, is a vested remainder; and yet, it is uncertain whether B may not die without heirs of his body in the lifetime of A, and so the remainder never take effect in possession. Hence, it will be seen that it is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder.[2]

Remainders and reversions are practically the same kind of an estate and are subject to the same incidents. They differ mainly in the manner of their creation. Thus, both have reference to a smaller precedent estate, called, during its continuance, the *particular*[3] estate. It is immaterial to whom this particular estate is given; but if at the same time and with the grant of the particular estate the donor also disposes of the remaining interest to some other person, such interest is called a *remainder*;[4] if no disposition is made of

[1] See Moore v. Lyons, 25 Wend. (N. Y.) 119.

[2] Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533; 4 Kent Com. 203.

[3] From *particula*, a part or parcel, which, together with the remainder constitutes the whole estate.

[4] The conception of remainders is said to be peculiar to English law. The Civil law did not admit of the simultaneous existence in different persons of separate rights of future and present enjoyment over the same subject matter, except perhaps in the case of *dominum* and the so called *jura in re aliena* (*ususfructus*, etc.) See Digby Hist. Real Prop. 268; Markby, Elements of Law 154.

the fee after the determination of such particular estate, it remains in the donor and is called a *reversion*. Hence, it will be seen that a remainder always has its origin in the act of the parties; a reversion arises incidentally through operation of law.[1] There can be no remainder when there can be no reversion.

Estates in Reversion.—The second species of estates in expectancy is called a *reversion*, and may be defined as the residue of an estate left in the donor, or his heirs, commencing in possession on the determination of a particular estate granted. The principle on which the idea of a reversion is founded is, that where a person has not parted with his whole interest in lands, all of that which he has not given away remains in him, and the possession of same reverts or returns to him upon the determination of the preceding estate. Thus, if a person seized in fee conveys his estate to A for life and after A's death then to B for life, he still retains the fee. And generally, whatever estate a man may have, whether for years, for life, or in fee, if he parts with only a portion of it, the residue remains in him, but the right to possession or enjoyment will only accrue upon the determination of the precedent estates. When the precedent estates have determined the possession reverts or returns to the holder of the ultimate interest and from this circumstance is derived the name "reversion."

Estates in reversion are vested interests, the right to future enjoyment being fixed, and such estates are alienable, devisable and descendible in much the same manner as estates in possession.

Strictly speaking there can be no such a thing as a contingent reversion, although there may be, and frequently is a *possibility of reverter*. But it is only a naked possibility that does not partake of the character of an estate and is not

[1] Consult Wms. Real Prop. 241; Wash. Real Prop. 535; 2 Black. Com. 169; 1 Prest. Estates, 74. In this connection the inquiring student may refer to Fearne's Contingent Remainders for much curious but obsolete learning.

legally assignable either by deed or will.[1] Thus, if an estate be granted to A and his heirs until B returns from Rome, the conveyance would create a possibility of reverter, but not a reversion; for if B were to die at Rome the estate in A would become absolute.[2]

Distinctions and differences.— From what has been said it will be perceived that there can be but one reversion; on the other hand almost any number of remainders may be carved out of the same estate. Thus, land may be given to A for ten years, with remainder to B for life, with remainder to C in fee, in which event B and C will both have an estate of freehold in remainder.

A reversion may be had in any kind of an estate but a remainder, in legal strictness, can be created only in freeholds. Thus, a lessee may sublet a part of his term in which event the residue will remain in him as a reversion, but if he creates out of his term a series of shorter terms, each to take effect after the determination of the one preceding, these sub-lettings would each be independent interests, and it seems that if he were to assign the term to one person for life, and limit the remainders after the life interest, the assignee for life would take the entire term and the remainders over would be void.[3] This results mainly from the character of the property. A term of years is regarded as personalty and the special rules which govern the ownership and disposition of realty do not apply.

Neither a reversion nor a remainder can be limited after an estate in fee. This follows from the very definition of these terms; a fee is the largest estate that can be had, and a remainder, which is only a residuary part, cannot be reserved after the whole is disposed of.[4] An apparent exception to this rule will sometimes occur in dispositions by last will and testament through the operation of what is known as an

[1] Presbyterian Church v. Venable, 159 Ill. 215.

[2] See Nicoll v. R. R. Co., 12 N. Y. 121.

[3] Deans Conv. 204.

[4] Deans Conv. 209; 2 Blk. Com. 164; Palmer v. Cook, 159 Ill. 300; Bradley v. Carnes, 94 Tenn. 27; Combs v. Combs, 67 Md. 11.

executory devise, but the exception is more apparent than real as the first limitation in fee, in such case, never takes effect, and courts, in order to carry out the intention of the testator, will sometimes permit the second limitation to become operative. The principles which govern this form of devolution will be explained in the subsequent chapter on testamentary conveyances.

III. Estates Considered with Respect to the Number and Connection of the Tenants.

Defined and Classified.— With respect to the number and connection of the owners, estates in land may be held in *severalty*, in *joint-tenancy*, and in *common;* the first being where all rights of ownership and possession are vested in one person; the second, where the rights of ownership and possession are vested in two or more persons jointly; and the third, where a separate right of ownership is vested in one person as an undivided interest which is united with those of other persons in the property. To these may be added estates by *entirety* and in *coparcenary;* the former being an intensified joint-tenancy, the latter partaking of the nature of an estate in common. Both will be explained in their place.

The estate in *severalty*, or where one person holds in his own right with none other joined with him in point of interest, is the usual and ordinary form of estate, and requires no further mention.

Estates in Joint-tenancy.— At common law, where lands are granted to two or more persons without any restrictive, exclusive or explanatory words, all of the persons named in the deed take a *joint-estate*, and are called *joint-tenants;* that is, they take collectively one undivided estate which they hold in their collective capacity. The estate arises only from grant, or by the act of the parties, and never by operation of law, and is characterized by the underlying principle of *unity*, which extends both to the interest, the title and

the possession.[1] In other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession,[2] and for many purposes the several tenants may be considered as constituting but one person.[3]

This union or entirety of interest gives rise to the principal incident of the estate, which is the *right of survivorship*, technically called *jus accrescendi*. Thus, if a grant be made to two or more persons in joint-tenancy, and one of them shall die, such death will work no change in the estate, but the survivors continue to hold same to the exclusion of the heirs of the deceased co-tenant, and so in like manner it continues to exist until the last survivor is reached, when it becomes an estate in severalty in him.[4]

But while all of the tenants are technically regarded as possessing but one estate between them, and each is considered as the holder of the whole, yet for purposes of alienation each has only his own share, and in the absence of qualifying words the shares are always presumed to be equal. Each is entitled to his *pro rata* part of the profits of the estate so long as he lives, but on his death, there being but one estate and this being held by his living co-tenants his interest becomes extinguished and nothing will descend to his heirs.[5] On the other hand, while thus united in their ownership and incapable of transmitting by descent, yet either tenant may convey his share to a co-tenant or even to a stranger, who will thereby become a tenant in common with the other co-tenant.

Of course there can be neither dower nor curtesy in an

[1] Coke, Litt. 180b; 2 Black. Com. 179; 1 Prest. Est. 136; 1 Wash. Real Prop. 641.

[2] Hence they are said to hold *per my et per tout*, or of the half and of all, that is, each is the holder of the whole.

[3] Wms. Real Prop. 109; 2 Black. Com. 180.

[4] Mette v. Feltgen, 148 Ills. 357.

[5] The survivor, of course, would have an estate of inheritance. It was a presumption of the feudal law that the survivor, having continued for the longest time in possession, had rendered the most service to the feud, and for this reason he was permitted to transmit the estate to his heir. See Deanes Conv. 241.

estate in joint-tenancy, the right of the survivor taking precedence of that of the husband or wife of the deceased co-tenant.

Joint-tenancy may be had in an estate of any duration, whether in fee, for life, for years or at will.[1]

As the right of survivorship was often attended with hardship and injustice, courts of equity at an early day took great latitude in construing against joint-tenancies on the ground of intent; while by statute in the United States the general rule now is that all estates vested in two or more persons are to be deemed tenancies in common, unless a different intention is clearly expressed or implied in the instrument creating the estate.[2]

While joint-tenancies may still be created by apt words, yet, as a general rule, their use is mainly confined to estates held by trustees,[3] and, under certain circumstances, as explained in the succeeding paragraph, by husbands and wives.[4]

Joint-tenancies are dissolved by any thing which destroys the unity of title, and this may be accomplished by *final vesture* of the entire estate in the surviving tenant; by a *merger*, as where one of two joint-tenants conveys to the other; by the *alienation* by any of the tenants of his share, in which event the tenancy becomes common; or by *voluntary partition* by the-co-tenants. By statute a *compulsory partition* may also be had, the effect of which is to create estates in severalty among the tenants.[5]

Estates by Entirety.—Another of the joint-estates derived from the common law is that which is created when a

[1] See 2 Black. Com. 179.

[2] See Mattox v. Hightshue, 39 Ind. 95; Shepardson v. Rowland, 28 Wis. 108; Murray v. Haverly, 70 Ill. 318. Compare Barnhart v. Campbell, 50 Mo. 597.

[3] As a rule where an estate is given to two or more trustees they will hold as joint tenants, and in case of death the survivor will take the estate. This is true even in those states where the right of survivorship, as an incident to joint estates, has been abolished.

[4] See Appleton v. Boyd, 7 Mass. 131; Jones v. Crane, 16 Gray (Mass.) 308; Hill on Trust. 303; Wms. Real Prop. 111.

[5] Consult local statutes.

conveyance is made to husband and wife which does not state the manner in which they shall hold the land, and is denominated a *tenancy by entirety.* It differs from the estate of joint-tenancy in that joint-tenants take by moieties and at the same time are each seized of an undivided part of the whole. In the estate by entirety neither tenant is seized of a part, or moiety, but both of them have the entire estate,[1] and as this involves in itself a physical impossibility in the case of ordinary individuals it necessarily follows that effect can only be given to the grant by regarding both tenants as constituting but one person. But this, in fact, is just what the law does, and as this unity of person is never recognized save in the case of husband and wife, the estate by entirety is confined exclusively to persons within the marriage relation.

A conveyance to husband and wife, in the manner above indicated, does not constitute them either joint-tenants or tenants in common; for they are, in legal contemplation, but one person, and hence unable to take by moieties. Both would therefore be seized of the entire estate; neither could dispose of any part of same without the assent of the other, and upon the death of either the whole estate would remain in the survivor. In this latter respect the estate also differs from joint-tenancy, for the survivor succeeds to the whole not by the right of survivorship simply, as is the case with joint-tenants, but by virtue of the grant which vested the entire estate in each grantee, or, in contemplation of law, in one person with a dual body and consciousness. In such an estate there can, of course, be no partition, as neither has any separate interest; between them there is but one owner, and that is neither the one nor the other, but both together.[2] It would seem, however, that either spouse may transfer his or her interest to the other.[3]

[1] Thornburg v. Wiggins, 135 Ind. 178; Aetna Ins. Co. v. Resh, 40 Mich. 241.

[2] Harding v. Springer, 14 Mo. 407 Den v. Hardenberg, 10 N. J. L. 42; Bennett v. Child, 19 Wis. 362.

[3] See Donahue v. Hubbard, 154 Mass. 537; Enyeart v. Kepler, 118 Ind. 34.

A married woman may, of course, take and hold real property as a joint-tenant, or tenant in common with her husband; and where by a deed to herself and husband it clearly appears that the intent was to convey to her not merely as a wife, but as an ordinary grantee, then by virtue of her individual right, as a common tenant with him, she has the power to dispose of her interest independent of him.[1]

In several of the states where the rule of entirety formerly prevailed, it has been held that the legal unity of husband and wife has been broken by the "married women's" acts extending the rights of such persons, and that they take only as tenants in common. But estates which had vested prior to the acts in question are not affected, changed or modified by them.

A review of the statutes shows that the legislation of the states concerning the property rights of married women has been very uniform, but the judicial construction of similiar statutes has been variant and contradictory. In some instances, as has been observed, courts have decided that statutes making joint-grantees tenants in common, and giving to married women the same rights in property as though they were sole, have effectually destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes; but in a majority of states the declared effect of these statutes has been confined to their express terms, and they have been held to have no relation to or effect upon real property conveyed to husband and wife jointly, and that, notwithstanding these statutes, they still take as tenants by entirety.[2]

Community Estates.—In a number of the Western states there is a peculiar system of property rights growing out of the marital relation, which, while it originated in the civil law, has been borrowed directly from the Spanish or Mexican law. This is known as the doctrine of *community.*

[1] Jooss v. Fey, 129 N. Y. 17; Haddock v. Gray, 104 Ind. 596; Hoffman v. Stigers, 28 Iowa 310.

[2] Bertles v. Nunan, 92 N. Y. 152; Bates v. Seeley, 46 Pa. St. 248; Robinson v. Eagle, 29 Ark. 202; McDuff v. Beauchamp, 50 Miss. 531.

The underlying principle of the community system is that whatever is acquired by the joint efforts of the husband and wife shall be their common property; that the matrimonial relation, in respect to property acquired during its existence, is, in fact, a community, of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution in case of one surviving the other. It extends to real as well as personal property and includes everything acquired by either husband or wife during the marriage, except that which accrues by gift, devise or descent.[1]

It would seem, however, that the interest of the wife, during the lifetime of the husband, is a mere expectancy,[2] and notwithstanding that the seizen is, in appearance at least, a joint one the husband may yet dispose of the entire estate by his sole conveyance at any time during their joint lives.[3] The doctrine of community is not uniform however in the states where it prevails and as it is purely statutory is subject to continual change.[4]

Estates in common.—At common law where two or more persons acquire interests in land by several titles they are called *tenants in common*, and by statute a community of interests creates the same relation even though such interests accrue through the same title, where the instrument of conveyance creating same does not expressly or impliedly provide for a different estate.

The only unity between tenants in common is that of *possession*. Thus, one tenant may hold in fee and another for life; again, one may take by descent and the other by pur-

[1] The doctrine only prevails in those states formed from the Mexican cession, Texas, and Pacific states. It is statutory.

[2] People v. Swalm, 80 Cal. 46. The Mexican Jurists seem to have regarded it as a feigned or fictitious ownership.

[3] See Beard v. Knox, 5 Cal. 252; Brewer v. Wall, 23 Tex. 585. In the State of Washington a different rule seems to prevail. It is there held that the wife has a vested interest in the community property. See Ballinger on Community Prop. § 78.

[4] Spreckels v. Spreckels, 116 Cal. 339, is an excellent case for study and illustration of the subject.

chase; so, too, the estate of one may have been vested for many years while that of the other may have commenced but yesterday. It will be seen, therefore, that the essential unities of interest, title, and time, which characterize an estate in joint-tenancy, have no application when an estate is held in common,[1] and, under the statute, notwithstanding all of these unities may be present on the creation of the estate, it may still be an estate in common.

Each tenant is seized of every part of the common property, and it is not in the power of any one to convey the whole thereof or any distinct portion of same;[2] but as property indivisible in character is incapable of several possession by each tenant, it therefore follows that the possession of one is a constructive possession of the others.[3] With respect to their interests, however, each tenant holds in severalty, and as there is no privity of estate between the tenants, each of them may sell and convey his individual right to a stranger.[4] So too, it follows that if the interests are in fee, the wife of a deceased co-tenant will be entitled to dower in his share, and if he dies intestate the same will descend to his heirs. This is one of the marked differences between estates in joint-tenancy and in common.

Estates in common, and, as a rule, all joint-estates, may be changed to estates in severalty in specific portions of the common property by a voluntary, or, in some cases, compulsory, division of same, the act of division and segregation being technically known as *partition*.

Partnership holdings in realty are, in many respects, governed by the same general rules that apply to tenants in common; and for most purposes, as between the partners, this is regarded as the character of their ownership. But as

[1] 2 Black. Com. 191; 1 Prest. Est. 139; 1 Wash. Real Prop. 652.

[2] Peabody v. Minot, 24 Pick. (Mass.) 329; Griswold v. Johnson, 5 Conn. 363; Duncan v. Sylvester, 24 Me. 482.

[3] Colburn v. Mason, 25 Me. 434; Brown v. Wood, 17 Mass. 68; Catlin v. Kidder, 7 Vt. 12.

[4] Butler v. Roys, 25 Mich. 53; Barnard v. Pope, 14 Mass. 434; Jackson v. Tibbits, 9 Cow. N. Y.) 241; Mobley v. Bruner, 59 Pa. St. 481; Madison v. Larmon, 170 Ill. 65.

between partners and third persons, or as between themselves, where the rights of third persons are concerned, the relation is strictly one of partnership, and the property is regarded as a partnership effect;[1] that is, as the property of the firm, regarded as a legal entity, and not as the individual property of each member of the firm. The effect of this is to render them for some purposes joint-tenants, with the right of survivorship for all purposes of holding and administering the estate until the obligations of the firm have been discharged.[2] Again, partnership in lands differs materially from a tenancy in common in reference to the power of disposal,[3] as well as in the further fact that none of the partners have any claim to any specific share or degree of interest in the property as tenants in common have, but only to the proportion of the residue which shall be found to be due them respectively upon final balance and adjustment of the accounts, and liquidation of the claims upon the firm.[4]

Therefore, so long as the partnership affairs remain unsettled, partnership lands are not distinguishable in legal effect from the money or other assets of the firm and are subject to practically the same incidents. For this reason such lands are regarded in equity as possessing the character and qualities of personal property until after the payment of debts and the adjustment of the equities of the parties.[5]

Estates in Coparcenary.—There is a further joint estate at common law known as *coparcenary* but which is now practically unknown in this country. The term is employed to indicate an estate of which two or more persons constitute but one heir, and it is said that while joint-tenancy refers to persons the idea of coparcenary refers to the estate. The

[1] And for this purpose acquires some of the characteristics of personalty. See Mauck v. Mauck, 54 Ill. 281; Scruggs v. Blair, 44 Miss. 406; Moderwell v. Millison, 21 Pa. St. 257.

[2] See Fairchild v. Fairchild, 64 N. Y. 471; Ware v. Owens, 42 Ala. 212; Holmes v. Self, 79 Ky. 297.

[3] See Ruffner v. McConnel, 17 Ill. 212; Jackson v. Stanford, 19 Ga. 14.

[4] Goddard v. Renner, 57 Ind. 532; Williams v. Love, 2 Head (Tenn.) 80; Hiscock v. Phelps, 49 N. Y. 97.

[5] Greenwood v. Marvin, 111 N. Y. 423.

tenancy is created only by *descent*, or by operation of law. While as to strangers the tenants seizen is a joint one yet as between themselves each is seized of his or her own share which at death will descend to heirs and not accrue to a survivor. During life the tenant may convey his share to a stranger or may compel partition and have same set out in severalty in a specific part of the property. During the continuance of the tenancy the right of possession is in common. In England the estate was generally raised for females, as where, in the absence of sons, several daughters together would form one heir to the ancestor's estate.[1]

In this country the term is often employed colloquially to designate a class of persons who take by descent instead of by purchase but it has little legal significance and practically there is no substantial difference between coparceners and tenants in common.

Partition.—As previously stated joint estates may be changed to holdings in severalty in specific parts of the common lands by a division and allotment technically known as *partition*. At common law this right could be exercised only by coparceners and it is said that the name "parcenary" arose out of this exceptional privilege enjoyed by joint heirs. As a rule it has always been competent for joint-owners to make a *voluntary* division of lands. In the case of joint-tenants this was accomplished by a mutual release while tenants in common conveyed their respective undivided interests by grant, but except in lands held in parcenary no *compulsory* process could be resorted to.

For many years, however, the power of compelling partition has been exercised by courts of chancery and in the United States the subject is generally regulated by statute.

[1] See 2 Black. Com. 188; Cruise Dig. Lit. XIX; 1 Wash. Real Prop. 650. This estate grew out of the legal fiction which identifies the heir with the ancestor. By the early English law there was but one heir; this was the oldest or only son. If the deceased left no sons then the daughter succeeded, and if there were several daughters they all took equally but only as one heir, the several persons being reduced to one legal entity for the purpose of preserving this old idea of identification.

Where the property is not susceptible of division a compulsory sale may sometimes be had and the proceeds thereof divided among the tenants.[1]

But it is competent for joint owners of land to have their estate so created as to prevent a partition thereof being made except by mutual consent and generally a grantor may impose as a condition of his grant that the premises shall not be divided.[2]

IV. Estates Considered with Respect to the Manner of Their Enjoyment.

Defined and classified.—With respect to the terms upon which they are held, or the manner in which they are to be enjoyed, estates are said to be

(1) Absolute, or

(2) On condition.

If the estate is held by a free and untrammelled grant, with no terms imposed or duties annexed thereto, then it is said to be *absolute;* if, on the contrary, there is annexed to the grant some proviso upon or by which the estate is to commence, or may be enlarged, or defeated, then such estate is said to be *conditional.* In order to clearly comprehend these matters it is essential to constantly keep in mind the fundamental distinction pointed out at the opening of this chapter between the *quantity* and the *quality* of estates, that is, with respect to duration and the character of the enjoyment.

The terms upon which an estate is held, when such are imposed, is called *tenure,*[3] a word which formerly implied much more than at present. By the feudal law of England every estate was conditioned on some service or other return to the lord of the fee, which was the tenure by which the estate was held.[4] The fundamental principle of feudal tenure was that all lands in the realm were originally granted

[1] Consult local statutes. See also, Burton v. Perry, 146 Ill. 71.

[2] Hunt v. Wright, 47 N. H. 396.

[3] The literal meaning of the word is holding.

[4] Consult 1 Spence, Eq. Jur. 135; 2 Black. Com. 53.

out by the sovereign, or *lord;* that the grantee, or *vassal*, was given only the possession and use of the land, according to the terms of the grant, and that the ultimate property of the *feud*, or fee, was retained by the crown. When the great vassals granted out portions of their lands they also became lords with respect to their grantees, though still tenants of the king, and because they occupied an intermediary position were called *mesne*, or middle, lords. The king was styled lord *paramount*, or over all. The feud was granted only after an obligation of fealty and was invariably conditioned upon the performance of some service. These tenures were of two kinds, *frank-tenement* (freehold) and *villenage*. The former consisted of something deemed honorable, the latter of something of a servile character. At first military service was esteemed the most honorable species of tenure but in time as the military features of the feudal system disappeared all of the various forms of tenure, and there was a large number, were practically reduced to one species called *free and common socage*, which is the tenure by which the larger portion of the lands of England is now held.[1] It denotes a tenure by any certain and determinate service, the performance of which is merely nominal. The term "socage" was once very prevalent in the older portions of the United States, but has now become obsolete. It was in general use prior to the revolution and many grants were held upon this tenure. After the establishment of American Independence it still continued to be employed, taking the place of feudal tenures, and, until by legislative action all lands were declared to be held in *allodium*, or absolute right, was the highest type of individual title known to the law.[2]

[1] For an interesting account of ancient and modern tenures consult, 2 Black. Com. 58; see also, Pollock and Maitland, Hist. Eng. Law, Vol. I p. 207, and the Introduction to Cruise's Digest.

[2] It is said to have signified a service rendered by a tenant to his lord, by the *soke* or plowshare, but later writers assert that the etymology of the word shows a derivation from the Saxon *soc*, signifying liberty or privilege, and denoting a free or privileged tenure. See 2 Bou. Law Dict. 528; 2 Black. Com. 80.

In its feudal sense tenure is unknown in the United States, but every estate conditioned on the payment of rent or other service to the landlord is held upon a tenure; and in like manner where any act or event is annexed to an estate as part of or incident to the grant, the estate, in a proper sense, is held by a tenure. Estates upon condition are not, however, a distinctive class of estates similiar to those we have just considered, nor do they, in any proper sense, constitute a species. Conditions are simply qualifications of estates, and may apply to any quantity of interest in land.

1. *Absolute Estates.*

Nature and Characteristics.—While the principal heads of this section are taken from the English law, yet, in its proper sense, no estate is held by the individual under the English land system in absolute ownership.[1] It is true that under that system the owner of an estate in fee may at his pleasure dispose of same, but this is practically nothing more than the liberty or privilege of putting another in his own place, who, like himself, will continue to hold the land as a tenant of the lord of the fee. If the land is held without restriction of any kind the estate is said to be absolute—or, as usually termed, a fee-simple absolute, but the king as the great lord paramount, will continue to have the ultimate right.

In the United States, however, where the doctrine of feudal tenures is now unknown, it is possible for one to possess what is pratically an absolute estate.

American Doctrine.—When by the Revolution the domination of the mother country was thrown off, the state in its sovereign capacity succeeded to the titles of the king and became the proprietor of all the lands. But instead of lending them like a feudal lord to an enslaved tenantry, it sold them for a fair price, or, with more than princely generosity, conferred them upon its citizens as a reward for industry and courage in the development and settlement of the country,

[1] See Wms. Real Prop. 17.

or in recognition of valor and patriotic devotion in its defense. Its patents all acknowledge a pecuniary or valuable consideration, and stipulate for no fealty or other feudal incident, and it may be truthfully said "the state is lord paramount as to no man's land."[1] However the title to land may have been derived, whether from state or federal government, or through pre-national grants, it is held in pure and free *allodium*, being the most ample and perfect interest that can be obtained in land, and denoting a full and absolute ownership, "a time in the land without end," with no duties to a superior lord, or services or fealty incident thereto. The allegiance which the citizen owes to the state is frequently spoken of as fealty,[2] but this is an obligation arising from our system of government, and is as binding on him who owns no land as on him who counts his acres by the thousands. It is an obligation, reciprocal to protection, resulting from and growing out of our political relations, and in no way affects the title to land more than to chattels.[3]

It is, however, a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be controlled and regulated by the state in such a manner as not to interfere with the equal enjoyment by others of their property, nor be injurious to the rights of the community,[4] and subject to such laws as the legislature may enact, to regulate the mode of conveyance, descent, right of dower or other rights growing out of the domestic relations.[5] All property is held subject to those general regulations established by law which are necessary to the common good and general welfare.[6]

[1] Wallace v. Harmstad, 44 Pa. St. 492; Van Rensellaer v. Smith, 27 Barb. (N. Y.) 157.

[2] See 2 Bouv. Law Dict. 585, art. "Tenure."

[3] Wallace v. Harmstad, 44 Pa. St. 492; Carlisle v. United States, 9 Wall. 146.

[4] Commonwealth v. Alger, 7 Cush. 53; Commonwealth v. Tewkesbury, 11 Met. 55.

[5] Barker v. Dayton, 28 Wis. 367.

[6] Ware v. Hilton, 3 Dall. (U. S.) 211.

2. *Estates on Condition.*

Generally considered.— Conditional estates are a portion of our inheritance from the feudal law, and originally grew out of the terms upon which fiefs were granted. They imply a holding by tenure, and for this reason, if none other, are not in accord with the genius of our institutions, which recognizes no superior lord holding reversions or other paramount rights, and are fundamentally opposed to the principles of ownership under allodial titles. Forfeiture, which is the inseparable legal incident of all strictly conditional estates, is not compatible with the modern American idea of full and complete ownership. It originated and was developed under a system radically different from that which obtains in the United States, and which recognized as the highest type of property in the subject only a leasehold interest; and although this interest might continue for an indefinite period of time and was dignified with the name of freehold, it was still dependent on conditions, and the reversion could never be lost to the ultimate lord.

The principle of forfeiture came to us with other inapt and inconsistent doctrines on the separation of the colonies, and has been retained through a series of years mainly because of a slavish and, in many cases, blind adherence to the formidable array of English precedents which American jurists have falsely endeavored to apply to our system of land titles and estates. But the original and inherent principles of allodial ownership, when unaffected by the doctrines of the common law, afford no room for reversionary rights in one who has parted with his title by an absolute conveyance; and the general doctrine of conditional estates, so far as it is administered in this country, forms in many respects an anomalous proceeding, unsupported by principle and authorized by very doubtful precedent.

It is to be hoped that as the bench and the ranks of the elementary writers continue to be recruited from men imbued with American ideas of American law, and freed from the harsh and inappropriate rules of our English inheritance, forfeiture of a fee-simple estate once vested will become an

impossibility, and the more just and enlightened rule of compensation or performance will provide an adequate remedy for all breaches of covenants and conditions.

Defined and classified.—A *condition* has been defined as a qualification annexed to a grant of lands, whereby it is provided that in case a particular event does or does not happen, or in case either party to the grant does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated.[1] But before we proceed further let us endeavor to arrive at a true conception of a condition within the lines of our definition. In every grant, in order that it may become effective, something must be done that is essential to the transaction. We cannot imagine a grant that is otherwise. Therefore we may safely conclude that whatever is, by the very nature of the transaction, essential to its existence, cannot be called a condition; were it otherwise all conveyances would be conditional. Hence, the term "condition" must be confined to some act or event naturally unessential to a transaction, but upon the happening of which it is nevertheless made to depend.

Conditions are classed as *precedent* and *subsequent.* Conditions precedent are such as must happen or be performed *before* an estate can vest or be enlarged. Condition subsequent indicate something to be performed *after* an estate has vested, the continuance of the estate depending upon such performance.[2] It is this class of conditions which has given rise to most of the litigation on the subject.

The legal effect of a condition precedent is to withhold the estate until performance; the legal effect of a condition subsequent is to defeat the estate already vested upon a breach or non-performance. But although the respective effects of these two classes are so divergent, it is not always easy to determine whether the condition is precedent or subsequent from the language employed. If, however, the act or condi-

[1] See Coke, Litt. 201a; 2 Wash. Real Prop. 2; Laberee v. Carleton, 53 Me. 211.

[2] Under the systems derived from the civil law these are known as *suspensive* and *resolutory* conditions. See civil code Louisiana, Art. § 2021.

tion required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent.[1]

Subsequent conditions, as they tend to defeat estates, are not favored by the courts. Forfeitures are said to be odious, and unless the conditions are clearly and minutely expressed, courts will, as a rule, eagerly lay hold of any plausible feature to sustain the grant.[2]

A grant of land upon condition subsequent conveys the fee with all its qualities of transmission. The condition has no effect to limit the title until it becomes operative to defeat it; and the possibility of reverter, which is all that remains in the grantor, is not an estate in the land.[3] The estate held by the grantee will, of course, remain defeasible until the condition be performed, destroyed, or barred by limitation or estoppel.[4]

Conditions are further classified as *expressed*, or conditions in deed, and *implied*, or conditions in law, the former being those which are declared in express terms in the grant creating the estate; the latter are those which the law presumes, either from their being always understood to be annexed to certain estates or as annexed to estates held under certain circumstances.

[1] Underhill v. Saratoga, 20 Barb. (N. Y.) 455; Finlay v. King's Lessee, 3 Pet. (U. S.) 374.

[2] Woodworth v. Payne, 74 N. Y. 196; Hunt v. Beeson, 18 Ind. 380; Taylor v. Sutton, 15 Ga. 103.

[3] Shattuck v. Hastings, 99 Mass. 23; Vail v. Railroad Co., 106 N. Y. 283.

[4] Osgood v. Abbott, 58 Me. 73; Hubbard v. Hubbard, 97 Mass. 188. Blackstone defines an estate so granted as a *base* or *qualified* fee. It is a fee because it may possibly endure for ever, and it is qualified because its duration depends upon collateral circumstances which qualify and debase the purity of the donation. See, also, Wiggins Ferry Co. v. Railroad Co., 94 Ill. 83.

Restrictions on the use of property conveyed are of frequent occurrence, but, unless also conditions subsequent, do not work a forfeiture in their violation. They consist usually of building regulations, sanitary measures and matters involving the good morals of community, as prohibition of the sale of intoxicating liquors on the premises, etc. They are designed ordinarily to prevent such use of the premises by the grantee and those claiming under him as might diminish the value of the residue of the land belonging to the grantor or impair its eligibility for particular purposes, and that such a design is a legitimate one, and may be carried out consistently with the rules of law by reasonable and proper restrictions, cannot be doubted. Every owner of property has the right to so deal with it as to restrain its use by his grantee within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains.[1] Such restrictions are recognized and upheld by the courts, and a violation of same will be restrained by injunction.[2]

A condition, whether precedent or subsequent, ceases to be of force or binding effect (1) when the condition imposed is impossible; (2) requires the performance of what is con-

[1] The only limitation on this right is that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade. Nor does there seem to be any doubt that in whatever language such a restraint is couched, whether in the technical form of a condition or covenant, or of a reservation or exception, or merely by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the immediate parties thereto, and may be enforced by or against their respective assigns. Whitney v. Railway Co., 11 Gray (Mass.), 359; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Watrus v. Allen, 57 Mich. 362. And see Warvelle on Vendors, p. 439.

[2] Dorr v. Harrahan, 101 Mass. 531; Cowell v. Col. Springs Co., 100 U. S. 55; Clark v. Martin, 49 Pa. St. 289. Where restrictions upon building are inserted in a deed as a part of a scheme for a plan of improvement, such restrictions, as a rule, though spoken of as conditions, are not to be deemed technical conditions whose breach involves forfeiture. Ayling v. Kramer, 133 Mass. 12.

trary to law or good morals; or (3) is repugnant to the estate granted.[1] So, too, it may be waived by the person for whom it was raised or who may be entitled to its enforcement,[2] either expressly or by implication of law;[3] and performance may be excused or deferred where circumstances are such as to preclude same.[4]

Operation and effect of conditions.—As a general rule the fact that an estate is subject to condition does not in any way affect its capacity for alienation, or of being devised, or descending in the same manner as an indefeasible estate, but the purchaser, devisee, or heir, takes it subject to whatever conditions may be annexed to it.[5]

Nor will a mere breach of any or all of the conditions upon which an estate has been conveyed have the effect of revesting the title in the grantor.[6] Such event would give him an option to declare a forfeiture, but this right he may waive either by express act or passive acquiescence.[7] The authorities are unanimous in declaring that, to render a breach effectual and revest an estate forfeited as for condition broken, some action is required on the part of the grantor. If he is not in possession he must make an entry, or by some act equivalent thereto assert a continual claim, manifesting a determination to take advantage of the breach;[8] if in possession, he must in some manner evidence an intent to hold possession by reason of the breach.[9] Until

[1] Iron Co. v. Erie, 41 Pa. St. 349; Merill v. Emery, 10 Pick. (Mass.) 507.

[2] Chalker v. Chalker, 1 Conn. 79; Hubbard v. Hubbard, 97 Mass. 192.

[3] Williams v. Dakin, 22 Wend. (N. Y.) 209; Andrews v. Senter, 32 Me. 397; Guild v. Richards, 16 Gray (Mass.) 326.

[4] Bradstreet v. Clark, 21 Pick. (Mass.) 389.

[5] Taylor v. Sutton, 15 Ga. 103; Wilson v. Wilson, 38 Me. 18; Underhill v. Railroad Co., 20 Barb. (N. Y.) 455.

[6] Railroad Co. v. Neighbors, 51 Miss. 412; Kenner v. American Contract Co., 9 Bush (Ky.) 202; Guild v. Richards, 82 Mass. 309.

[7] Coon v. Brickett, 2 N. H. 163.

[8] Osgood v. Abbott, 58 Me. 73; Fonda v. Sage, 46 Barb. (N. Y.) 123; Green v. Pettingill, 47 N. H. 375.

[9] Hubbard v. Hubbard, 97 Mass. 188.

this has been done the grantee holds his estate, liable to be defeated, but not actually determined by a ferfeiture.[1]

By the rules of the common law, which discourage maintenance and litigation, nothing that lies in action, entry, or re-entry can be granted over; and while this rule has in many respects been greatly relaxed and changed, it still holds good with regard to conditions, and no grantee or assignee of a reversion can take advantage of a re-entry by force of a condition broken. This privilege is confined to the grantor and his heirs, who alone may take steps to forfeit the estate; and if they neglect or refuse to so do the title remains in the grantee for all practical purposes unimpaired.[2]

Generally any one may perform a condition who has any interest in it, or in the land whereto it is annexed;[3] and when a condition is once performed, unless it is one which requires continual performance, it is thenceforth entirely gone, and the estate to which it was before annexed becomes absolute.[4]

Conditional limitation.— A condition followed by a limitation over to a third person in case of breach or non-fulfillment, is termed a *conditional limitation.* Thus if land is granted to A so long as he shall reside upon it, with remainder over to B, this would create a conditional limitation. That is, if A should abandon the land or select some other place of residence the estate held by him would immediately determine and the subsequent estate immediately vest in B. A conditional limitation is therefore said to be of a mixed nature partaking both of a condition and of a limitation; that is, of a condition because it defeats the estate previously limited, and of a limitation, because upon the happening of the contingency the estate passes to the person having the next expectant interest.

It will be seen, therefore, that an estate upon condition, as described in the foregoing paragraphs, differs materially

[1] Stone v. Ellis, 9 Cush. (Mass.) 95; Spofford v. True, 33 Me. 283; Spect v. Gregg, 51 Cal. 198.

[2] Smith v. Brannan, 13 Cal. 107; Merritt v. Harris, 102 Mass. 328; Norris v. Milner, 20 Ga. 563.

[3] Joslin v. Parlin, 54 Vt. 670.

[4] Vermont v. Gospel Society, 2 Paine (U. S. C. Ct.) 545.

from a conditional limitation. The estate in either case is conditional, but the distinction is that the former, while liable to defeat, yet requires some act to be done by the person who has the right to avail himself of the condition, and is not in fact determined until there has been an entry or some other equivalent demonstration; the latter, on the contrary, is determined by operation of law without any act by any person, and ceases to exist upon the happening of the event by which its limitation is measured.[1] In the former the reservation can only be made to the grantor or his heirs, who alone can take advantage of a breach of the condition, while a stranger may have the benefit of a limitation.[2]

In practice the question arises most frequently in the construction of grants to churches or religious societies or of lands to be used for some public or quasi-public purpose. In such cases the authorities are united in declaring that the precedent estate terminates whenever the land ceases to be used for the purposes indicated in the grant and the subsequent estate at once vests without entry or any other act.[3]

Obsolete forms of Estates.—There were in England a number ef estates which grew out of the relation of debtor and creditor, known as estates by "Statute Merchant," "Elegit," etc., which were in the nature of conditional estates, being held by the creditor until from the rents and profits of the land a sufficient sum should be realized to satisfy his debt. These estates, however, are not recognized in this country and, notwithstanding that they are frequently mentioned by American writers, have no place in the American law of Real Property. Prof. Washburn, as well as others who have followed his lead, has endeavored to construct an estate, intended to correspond with the English estates above mentioned, which he calls "Estate by Execu-

[1] Miller v. Levi, 44 N. Y. 489; Henderson v. Hunter, 59 Pa. St. 340; Osgood v. Abbott, 58 Me. 73.

[2] Southard v. Railroad Co., 29 N. J. L. 1; Owen v. Field, 102 Mass. 90.

[3] See Henderson v. Hunter, 59 Pa. St. 335; Brattle Sq. Church v. Grant, 3 Gray (Mass.) 142. This latter is a very instructive case and will repay careful and critical study by the student.

tion." No such estate can be said to exist, however, for on a sale under execution no title passes until delivery of deed, and until the expiration of the period of redemption the judgment debtor possesses the entire interest in the land. The lien held by the execution or judgment creditor is not an estate.

V. Equitable Estates.

Generally Considered.—In its early simplicity the common law did not admit of any estate in land that was not sustained by legal seizin and possession. In course of time, however, a right to the profits of lands, whereof another person had the legal seizin, was introduced, and, though not recognized by the common-law courts, received the sanction of courts of chancery under the name of a *use.* Subsequently statutes were enacted with the object of subjecting uses to the rules of the common law, and under their operation the ancient *use* developed into what is known as a *trust.* In modern law that which goes by the name of a trust is substantially the same as that which in the ancient books is called a use.

The exact origin of uses and trusts does not seem to be definitely known, but their adaptation from the Roman to the English law may be traced, in part at least, to the ingenuity of fraud; as by the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restriction directed against the growing wealth of the church by the statutes of mortmain.[1]

The device grew with years into a highly complex and subtle system, most ingenious in its details and far reaching in its scope, and became incorporated into the common law of the United States, together with numerous other old-world exotics. But about the middle of the last century,

[1] 1 Spencer, Eq. Jur. 436; 2 Black. Com. 328; Sand. Uses, 17; 1 Wash. Real Prop. 384.

commencing, say about 1845, a series of radical and sweeping changes were introduced, by which the whole doctrine of uses and trusts, with all its refinements and subtleties and its accumulation of precedents and curious learning, was practically abolished, and by statute a few simple rules have been established to govern this branch of the law.

Uses.—It would seem that at quite an early period in the history of English law there prevailed a practice of one person conveying land to another upon a private agreement or understanding that the latter should hold the lands for the benefit or profit of the former or of some third person. The practice received a strong impetus during the reign of Edward III. by the action of the churchmen, who resorted to it to evade the operation of restrictive statutes, and to enable them to receive the rents and profits of land which, by those statutes, they were prohibited from holding in their own names.[1] After this it came to be employed by all classes.[2]

In its earlier form a use rested simply on a moral or religious obligation—a confidence—and there was no means whereby the same could be protected. It would naturally follow that while the rights of the real owner were so precarious and depended so entirely on the good faith of the nominal owner, that frequent breaches of the trust would be committed; and this induced the clerical chancellors of those times to rule, by analogy to the civil law, that the use so limited was binding in conscience, and new writs were invented to render same effective. At first chancery assumed no other jurisdiction in case of uses than to compel payment of the rents and profits to the beneficiary, but in time it advanced further and established the rule that a beneficiary had a right to call on the feoffee to uses, or nominal owner, for a conveyance of the legal estate, either to himself or to any other person he might appoint.[3]

[1] The idea of a use and the rules by which it was first regulated are generally supposed to have been borrowed by the ecclesiastics from the *Fidei Commissum* of the civil law: See Jus. Inst. lib. 2 Tit. 23.

[2] 2 Black. Com. 328; Cornish, Uses, 12.

[3] Cornish on Uses, 12; 1 Spence Eq. Jur. 338; Coke, Litt. 272a.

Then grew up an elaborate and subtle system of uses regulated and settled by the court of chancery. Sometimes the doctrine was applied to useful purposes, by removing restraints on alienation, and enabling owners to exercise powers over land which were not allowed by the common law. But uses became so general, and were frequently applied to such bad purposes, that at length they began to be regarded as an evil. Conveyances (feoffments) to use were generally made in secret, so that when a person had cause to sue for land he could not find the legal tenant. Husbands were deprived of their curtesy, widows of their dower; creditors were defrauded; feudal lords lost the profits of their tenures, and a general obscurity and confusion of titles prevailed.[1]

As a remedy for these inconveniences several statutes were enacted, until finally in the twenty-seventh year of the reign of Henry VIII. a law was passed, usually known as *The Statute of Uses*, the object of which was to abolish uses by transferring the legal estate from the feoffee, or the nominal owner, to the beneficiary, or the real owner, the use being changed, by operation of the statute, to a legal estate. The effect of this law may be shown as follows: thus, if A should convey to B in fee but for the use of C, by operation of the statute no title whatever would vest in B, but C, having been named to take the use, would at once become clothed with the full legal title. Therefore, in the technical language of the books, the use is said to be executed in C by the statute.[2]

This statute, in substance, has either been re-enacted in all of the states, or its principles recognized and confirmed.

Trusts.— While the object of the enactment of the Statute of Uses was to obliterate the distinction between legal estates and beneficial interests, the judges, by a strict construction thereof, defeated in a great measure its practical effect. They held that there were some uses which the statute did not execute, and that a concientious obligation, unrecognized by law, might still be enforced by the chancellor;

[1] Cruise Dig. Tit. XII, ch. 1.

[2] The student will read in this connection the statute of uses as enacted in his own state.

and so uses were not wholly abolished, but still continued, under certain conditions, to be noticed and supported by the court of chancery under the name of *trusts*. One of the evasive methods resorted to was the limitation of a use upon a use, the second use being called a trust. Thus, land was conveyed to A for the use of B, in trust for C. Of course the statute would execute the first use and B would become the legal owner, but C's interest, not being affected by the statute, remained under the protection of the chancellor, who might decree performance by B as a "conscientious obligation." This was practically the origin of the modern doctrine of trusts and the device which gave to it the present name.

A *trust*, therefore, may be not inaptly defined as a use not executed by the statute, and consists, in its essence, of an obligation arising out of a confidence.[1] It will, perhaps, be better understood if we say, it is a right of property held by one party for the benefit of another—this is strictly a use, but a trust, as before remarked, is only the modern name for a use.

Now, as we have seen, a simple conveyance to use is immediately executed by the statute, therefore, our last definition requires some qualification. It was early held that there were forms of estates upon trust which could not be executed by the statute, or transferred by operation of law from the nominal grantee to the beneficiary, and that this occurred whenever an *active duty* was imposed upon the grantee to perform certain acts in reference to the land, as to collect and pay over the rents to a third person. In such case it was held that the grantee should retain the legal estate but charged with the conscientious obligation to perform the trust upon which he had received the land, and from this was deduced the principle, which has remained intact until our own day, that where an active duty is imposed on the grantee the

[1] Cruise, Dig., tit. XII, ch. 1; Gilbert, Uses, 74; Wms. Real Prop. 133.

use or trust will not be executed by the statute but shall be left to be enforced by a court of chancery.[1]

Classification and division of trusts. — In the modern law of real property trusts have assumed a position of great importance. They constitute one of the principal methods for the protection of infants and other incapacitated persons, while by reason of the facilities they afford for dispositions of property in ways which are not available at law, the tendency is toward a still wider employment.

There are two general divisions under which may be grouped all forms of trust. The first comprehends all those cases where legal ownership is conferred on a fiduciary who holds for the benefit of specific persons. This we may call the *ordinary* trust. The second, is where the trust is declared for a public purpose and not for the benefit of specific persons; this is known as a *charitable* trust.

Trusts are said to be *express*, as when created by direct volition and apt language, or *implied*, as when a presumption is raised by law from the acts and relations of the parties.[2] They are further classified as *active*, where the grantee has a duty to perform, or *passive*, where the grantee simply holds a naked interest, and *executed* or *executory*. Implied trusts are subject to a further division into *resulting* and *constructive* trusts, the former being where the law raises a presumption as to the intention of the parties from their acts; the latter being raised, without any reference to presumed intention, for the purpose of preventing fraud. The distinction between resulting and constructive trusts is not always apparent, and practically is of little importance as the rules which govern are the same in both cases.

An *express* trust is created by a deed or declaration in

[1] The abolition of the distinction between law and equity, as contemplated by the codes, has not materially affected the rule so far as pertains to its practical application.

[2] Mr. Washburn, and many of the English writers, adopt a different classification. The one given in the text has the merit of brevity and simplicity, and is that which prevails generally in this country at the present time.

writing[1] and perfected by the acceptance of the trust by the person commissioned to perform it. This is the usual and ordinary form of trust. As soon as the trust has been perfected the land which it affects at once becomes the subject of double ownership. That is, the legal ownership or estate becomes vested in the trustee; the equitable ownership or estate becomes vested in the beneficiary of the trust.

A *resulting* trust arises where there has been a transfer of the legal ownership but it is apparent, either from the language of the deed or from attendant circumstances, that the beneficial interest was intended to vest in some other person, although there is no declaration as to who that person should be. In such case a trust results, by operation of law, to the real owner.[2] Thus, if in a conveyance it is apparent that no beneficial interest was intended to accompany the legal ownership, and no other sufficient and effectual disposition has been made, it will result back to the original owner.[3] So too, where land has been purchased in the name of one person and the purchase money has been paid by another, the presumption is, that the person so paying for the land intended it for his own benefit, and the nominal purchaser will be held a mere trustee.[4]

Where property has been acquired by fraud the grantee will be regarded in equity as a trustee for the party injuriously affected. In such cases a *constructive* trust arises in favor of the rightful owner. But though fraud is the active agency in the creation of most trusts of this character there may be implied trusts where that element is wholly wanting. Thus when there has been a contract for the conveyance of land the vendor, before conveyance, is, in equity, treated as a trustee of the land for the vendee, the vendee, on the other hand, being regarded as a trustee of the purchase money for the vendor. These are strictly constructive trusts.

[1] This is required by the statute of frauds; therefore an express trust cannot be proved or established by parol.

[2] Dennis v. McCagg, 32 Ill. 429.

[3] Adam's Eq. * 32; Hill on Trustees, 179.

[4] Boyd v. McLean, 1 John. ch. (N. Y.) 582; Dryden v. Hanway, 31 Md. 254; Thomas v. Jameson 77 Cal. 91.

The person creating a trust is called the *settlor*, the person accepting the trust the *trustee*, and the person for whose benefit the trust is raised the *beneficiary* or *cestui que trust*. As a rule any estate or interest in lands may be made the subject of a trust, provided the settlor has the legal power and the *cestui que trust* the capacity, the one to give and the other to receive, the beneficial interest intended.[1] So, too, any person capable of taking and holding the property of which the trust is declared, and possessed of sufficient legal ability to execute same, may properly be a trustee.[2]

Present Condition of Trusts.—A majority of the states have abolished passive trusts, that is, those forms wherein the trustee holds only the naked legal title, the whole beneficial interest in the land being vested in the *cestui que trust;* the statute, in such cases, confirming to such beneficiary a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest.

The doctrine of resulting trusts from implication of law has been modified to conform to the rules respecting express trusts, but otherwise has not been materially affected by statute.[3]

The whole subject of express trusts is almost purely statutory, and such trusts can only be raised for a few enumerated purposes, generally as follows: (1) to sell lands for the benefit of creditors; (2) to sell, mortgage or lease lands for the purpose of satisfying some charge thereon; (3) to receive the rents and profits of lands and to accumulate same for the benefit of some specified person; (4) to receive the rents and profits of lands and apply them to the use of some person for a definite period; (5) for the beneficial interest of some person when the trust is fully expressed and clearly defined upon the face of the instrument creating it. In all cases trusts are subject to the rules prescribed by statute fixing the quantity and quality of estates.

[1] Robinson v. Mauldin, 11 Ala. 977; Calkins v. Lockwood, 17 Conn. 154.

[2] Sutton v. Cole, 3 Pick. (Mass.) 240.

[3] In a few states this doctrine seems to be abrogated, or given a very limited effect.

Where the classes of express trusts are specifically enumerated by statute, the creation, for any purpose, of any trust not so enumerated vests no estate in the trustee; though if valid as a power, the land to which the trust relates remains in or descends to the persons otherwise entitled, subject to the execution of the trust as a power. No particular form of words is necessary to create a trust, and effect will always be given to the intention of the parties.[1]

Charitable Uses.— Where the legal ownership of property is vested in a fiduciary holder, not for the benefit of specific persons, but for some public purpose, the trust is known as a *charitable use.* In this connection the word "charity" has a technical signification quite different from that which it ordinarily bears. Usually we associate this word with gifts and benefactions to the poor, but this is not the sense in which it is employed in equity when applied to trusts.

During the latter part of the reign of Queen Elizabeth a law was enacted called the *Statute of Charitable Uses.*[2] This statute enumerated the public purposes for which a trust might be raised and these purposes, together with others analogous to them, are considered by equity as charities. They contemplate not only the relief of the indigent, sick, or helpless, but gifts for the maintenance of schools, libraries, public works, or any other beneficial or useful public purpose.[3] All gifts of a public or general nature which come within the purposes contemplated by the statute are upheld as charitable uses. Those which do not are denied effect.

The subject has been productive of a vast amount of litigation and still continues to furnish a fruitful field for controversy. As to what is and what is not a charitable use no rule can be formulated from the decisions, but the tendency is to give effect to gifts of this character whenever same can be done consistently with established rules. A gift merely

[1] Fisher v. Fields, 10 Johns. 495; Saylor v. Plaine, 31 Md. 158.

[2] 43 Eliz. c. 4.

[3] Fairbanks v. Lampson, 99 Mass. 533; Haines v. Allen, 78 Ind. 100; Swasey v. Bible Society, 57 Me. 523.

for useful or benevolent purposes, without specifying what the purposes are is void as a charitable use, as are also gifts to mere private charity.[1]

The incidents of a trust for charitable purposes are in the main the same as those of an ordinary trust. There is, however, a peculiar feature of these gifts not found in other cases of trusts. This occurs where an apparent intention has failed, whether by an incomplete disposition at the outset or a subsequent inadequacy of the original object, and in such case an approximate application is permitted, to the exclusion of a resulting trust in the donor. This is technically known as the doctrine of *cy pres*.[2] Thus, if the gift be for the benefit of an object that has ceased to exist; or if the object is not sufficiently specified, the presumed general object may still be effected by applying the gift to some other purpose, having regard as nearly as possible to the original plan.[3]

Powers.—Closely allied to trusts, and partaking somewhat of their nature, are *powers*, the creation, construction and execution of which are, in a majority of the states, governed by express statutory provisions. A power, as defined, is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform; and no person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates.

The doctrine of powers grew out of the doctrine of uses and trusts, of which it is a modification. Prior to the enactment of the statute of uses it was customary for the grantor of an estate to use, if he did not wish to make a full or final disposition of the use, to reserve to himself the right of declaring, at a future time, to whose use the lands should be held, or to whom the trustee should convey them. This

[1] Adams Eq. * 66, and see Claypool v. Norcross 42 N. J. Eq. 545; Minot v. Baker, 147 Mass. 348.

[2] From the French, meaning as near as possible.

[3] Adams Eq. * 71. In a number of states the doctrine of *cy pres* has been specifically abolished.

right he was privileged to exercise though by so doing he might defeat a present use which he had declared at the time of making the feoffment; or he might, when making the feoffment, provide for such a future disposition of the use by some third person, and that the trustee should convey the lands as such third person should appoint or direct. From this principle are derived what are known as *springing* and *shifting uses*, by which a grantor of land may provide that upon the happening of some future event a use shall *spring up*, or that a use declared in the deed of conveyance may *shift* from one person to another, without any further act in the way of transfer. It will be perceived that a shifting use always takes effect in derogation of some other estate, but a springing use, being limited to arise on some future event, where no preceding estate is limited, is not in derogation of any preceding interest.[1]

After the enactment of the statute of uses the chancellors so construed it as to retain cognizance of uses to be raised or declared by the means above mentioned, and thus introduced measures for making changes in the ownership of estates which were wholly unknown to the common law. It was in this way that the whole system of modern powers had its origin, and from this source they derive their properties and qualities.[2] In most of the states powers, like trusts, are defined and regulated by statute.

The distinctive characteristics of a power may be illustrated as follows: Thus, if an estate be limited to A for life, with remainder to B, but if B die in the lifetime of A, leaving no issue, then to such person as A shall appoint, it will be seen that A has a life estate in his own right and a power of disposal of the fee contingent on B's death. This is called a *power of appointment*, and the person taking under such a power is termed the *appointee*. The subject will be further considered when we shall come to its practical application under the head of conveyances.

[1] See 2 Wash. Real Prop. 635; Sugd. Powers, 4.

[2] Consult, 2 Wash. Real Prop. 636; Wms. Real Prop. 245.

Classification of Powers.—Powers are *general* or *special*, and *beneficial* or *in trust*.[1] A power is *general* when it authorizes the alienation in fee, by deed, will, or charge of the lands embraced in the power, to any alienee whatever; and is a simple form of familiar occurrence. It is *special* when the appointee is designated, or where it authorizes the conveyance of a particular estate or interest less than a fee. A general or special power is *beneficial* when no person other than the grantee has, by the terms of its creation, any interest in its execution. A general power is *in trust* when any person other than the grantee, is designated as entitled to the proceeds or other benefits to arise from the alienation of the lands. A special power is *in trust* when the disposition which it authorizes is limited to be made to any particular person other than the grantee; or when any class of persons other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power.

A power may be granted by a suitable clause contained in the conveyance of some estate in the lands to which same relates; or by devise contained in a last will and testament; and may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands holden by such person.

A power, technically speaking, is not an estate, but is a mere authority, enabling a person, through the medium of the statute, to dispose of an interest in real property vested either in himself or in another person;[2] and where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it.[3]

A power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor, and when the purpose becomes wholly unattainable,

[1] Kent, Com. 319; 2 Bouv. Law Dict. 356. The classification above given is that which is now generally observed in this country, though it differs somewhat from the common-law classification.

[2] Burleigh v. Clough, 52 N. H. 268; 2 Prest. Abstracts, 275.

[3] Legget v. Doremus, 25 N. J. Eq. 122.

the power ceases.[1] In the construction of powers, the intention of the parties, if compatible with law, must govern; and the intention is to be determined from the instrument creating the power.[2]

VI. Merger of Estates.

General Principles.—It is a general rule that whenever a greater and a less estate meet in the same person, without any intermediate estate, the lesser becomes absorbed in the greater,[3] the fusion being known as a *merger*. Thus, where the legal and equitable estates meet in the same person, without an intervening interest outstanding in a third person, the equitable becomes merged in the legal estate, the latter alone subsisting.[4] So too, if one who has a life estate in lands should acquire the remainder or reversion, the lesser, or life estate, would then become merged in the greater, or the fee.

Merger is distinguished from *suspension*, which is but a partial absorption occasioned by the temporary union of two interests or estates, and differs from *extinguishment*, which implies the annihilation of a collateral subject, right or interest in the estate out of which it is derived. In practice, however, particularly in the United States, this distinction is rarely observed, and an extinguishment, in effect, will be regarded as a merger. Thus, in the first example cited, where the legal estate and equitable ownership unite in the same person, the equitable interest, strictly speaking, is extinguished in the legal estate, upon the principle that a man cannot be a trustee for himself, but the distinction is so subtle that courts rarely recognize it.

While the rule of merger is said to be inflexible at law, yet in equity it is subject to many modifications, and when

[1] Hetzel v. Barber, 69 N. Y. 1.

[2] Guion v. Pickett, 42 Miss. 77; Jackson v. Veeder, 11 Johns. 169.

[3] Jackson v. Roberts, 1 Wend. (N. Y.) 478; 2 Black. Com. 177; 4 Kent Com. 100.

[4] Jackson v. Devitt, 6 Cow. (N. Y.) 310.

it becomes necessary to advance the ends of justice the two estates will always be kept separate.[1]

Where a tenant for years yields up his estate to the landlord, or person possessing the superior estate out of which the term was created, the action is technically a *surrender*, the practical result being an extinguishment of the term.

The general rule is that estates of equal degree do not merge in each other, but it seems that even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder, being in this respect somewhat like a surrender. At all events, the effect of a merger will be produced by the unity of possession.[2] This is shown is the case of several successive life estates.

[1] Huebsch v. Schnell, 81 Ill. 281; Aiken v. Railroad Co., 37 Wis. 469; Powell v. Smith, 30 Mich. 451. Under the old methods of conveyancing merger was frequently employed to consummate title. Thus, if A, the owner of the fee, wished to convey the land to B, he might make a lease under which B would enter and then, being in possession, would be capable of taking a release by deed of the reversion in fee. This was called a conveyance by lease and release and became in time the usual mode of conveying land in England.

[2] Boykin v. Ancrum, 28 S. C. 486.

CHAPTER IV.

TITLE TO REAL PROPERTY.

Analysis of the authority by which an estate in land is held and the method of its acquisition—Primary divisions—Various forms of title—Derivations of same; through act or agreement of the parties; through act or operation of law—Incidents of title.

Defined and classified.—As has been shown in the preceding chapter, the interest which a person may have in lands, tenements or hereditaments is described in the comprehensive term *estate;* the method of acquiring and right of holding such interest is denominated *title.* Title, therefore, is properly an incident of estates. In fact, in all sales or dispositions of real property the title is inseparably connected with the estate, and represents the right or authority for the enjoyment of the land, even as the estate represents the quality and extent of such enjoyment.

Thus, if A becomes invested with an estate in fee by deed from B his right to hold the land will be referred to such deed. If B possessed the ownership and right of disposal of the estate, this will constitute A's title. But if B was without such right, notwithstanding his deed may have been regular in form, then A's title fails. Every land owner holds his estate by some kind of title and whenever he is unable to connect his possession with some species of valid authority he must give way to some other person who can show a better right.[1]

When estates are conveyed by act of the parties or arise through operation of law, the title is said to *devolve*, that is, to pass from one owner to another in succession, and the

[1] Title, as defined by Blackstone, is "the means whereby the owner of lands hath the just possession of his property." 2 Black. Com. 195. According to Austin it is the "facts or events on which by the dispositions of the law rights arise or come into being, and also the facts or events on which by the dispositions of the law, they terminate or are extinguished." 2 Austin Jur. 902.

various devolutions are called the *chain of title.* Title is established in various ways and rests upon some kind of legal evidence. This evidence may consist merely of the fact of possession but generally it is made up of deeds, records, judicial decrees and judgments, or other similar matters, all of which are known as *muniments of title.*

The primary classification of the subject is as follows:

I. Original title.

II. Derivative title.

Original title rests in some degree on fiction, and denotes that state of ownership beyond which inquiry cannot be made, the land being held in paramount right. Derivative title is any and all of the forms of title that devolve or flow from the original or paramount right. In its practical application this division is shown in the relations sustained by the sovereign and the people in their individual capacities.[1]

Title may also be classified as *legal* and *equitable*—a distinction originally applied only to estates, but now extensively used to designate the manner of acquiring and holding them as well. The equitable title usually carries with it the beneficial interest in the land, together with the incidents of ownership, the legal title being held as a mere naked trust.

Custom has also introduced another species of classification, based on the impairments or defects which may exist in the muniments of the title asserted by a vendor, by which the title is said to be either *doubtful* on the one hand, or *marketable* on the other. Marketable titles are those which a court of equity considers so clear that it will enforce their acceptance by a purchaser; a doubtful title, on the contrary, is one that a court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it.[2] The doctrine of marketable titles is purely equitable and of modern origin; at law every title is marketable.

[1] Consult Taylor, Civ. Law, 476; 2 Black. Com. 195; Burt. Real Prop., § 418; 3 Wash. Real Prop. 2.

[2] Richmond v. Gray, 3 Allen (Mass.) 25.

In commercial parlance we often hear of "good" and "bad" titles, and not infrequently lawyers are betrayed into the use of these terms in framing opinions, etc. No such distinction, however, is known to the law. "Good" title is simply title; "bad" title is no title at all. A title, or a particular assertion of title, may be defective; but there are no comparative degrees of title, for even a "good" title would suggest a "better." The prevalence of the use, or rather misuse, of the terms seems to justify this digression.

Art. I. Original Title.

Generally considered.—In its strict definition original title is that right by which a person attains property in a thing which at the time of its acquisition is not in the ownership of any other person. In the law of real property this definition must be modified by circumstances. It is difficult to imagine a time when land upon the continents was not subject to some kind of human occupancy and proprietary right and therefore the law has fixed points beyond which it will not suffer an inquiry to be made. These points mark the initiation of all recognized proprietary interests and the right by which such interests are held we call *original* title.

The original source of title, according to the rules of the common law, is the king, who, as the official head and sovereign representative of the nation, is the great lord paramount of all lands within the territorial boundaries of the country.[1] He is the true and only source of legitimate ownership, and from him, either mediately or immediately, all the lands in the realm are held.[2]

[1] Wms. Real Prop. 118; 2 Black. Com. 53. In this connection the student may, with profit, read Hallam's Middle Ages. For secondary reading, Reeves' History of English Law is also recommended, although many of the conclusions of this writer are open to doubt.

[2] This results from the ancient English tenures. When William the conqueror ascended the English throne he granted to his followers large portions of the confiscated lands of the Saxon Thanes, and at the same time persuaded those who were permitted to retain their lands to surrender possession under their allodial titles and receive the land back to be holden by a feudal tenure. In consequence of

The changed conditions of national life in the United States have not materially altered the practical application of this ancient rule. Although we have abolished the feudal tenure yet it is still true that the goverment, either state or federal, representing the sovereignty of the people, is the original source of title to all lands not held under pre-national grants. The original thirteen states, as also Texas, retained their lands on entering into the Union, and in these states the source of title is the state. In the remaining states, with but few exceptions, as Vermont, whose territory was claimed by New York and New Hampshire, etc.,[1] the original title

this it became a fundamental maxim, or rather fiction, of English law, that all lands in the kingdom were originally granted by the kings, and held, mediately or immediately, of the crown, in consideration of certain fealty and service to be rendered by the tenant. The principle was retained in the grants to the English colonists in America and so became engrafted upon American law. Therefore, while the feudal principle has never been admitted in this country as a feature of political government it does seem to have some application with respect to the source of those rules which regulate the acquisition and transmission of real property. The student will find an interesting discussion of this topic in 3 Kent Com. 510, but the deductions of the learned author have to some extent been denied in later years.

[1] Kentucky was part of Virginia, Tennessee of North Carolina, and Maine was claimed by Massachusetts. The territory "northwest of the river Ohio" was originally claimed by Virginia, and was conveyed to the United States by the deed of cession of March 1, 1784, as a common fund for the use and benefit of all the states, "upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit; and that the states so formed shall be republican states and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states." The state of North Carolina, by deed of cession dated February 25, 1790, ceded the territory now constituting the state of Tennessee; and the state of Georgia, by deed of cession dated April 24, 1802, substantially the same as the Virginia cession, conveyed the territory forming the present state of Alabama. New York, Connecticut and Massachusetts also made deeds of cession, but these were practically but quit-claims. The remaining territory was acquired by purchase and conquest. The cessions of

to the soil was in the general government. All the lands in the territories, not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, in such modes, and by such titles as the government may deem most advantageous to the public. This right has been uniformly reserved by solemn compact upon the admission of new states, and has always been recognized and scrupulously respected by the states within which large portions of the public lands have been comprised, and within which much of these lands are still remaining.

The lands belonging to the state are distinguishable into two general classes: (1) Those which it owns by virtue of grants from the United States. (2) Those which it owns by reason of its sovereignty. The states entering the Union as sovereign proprietors claim original, and, in some instances, ultimate title in all their lands, while the class of lands in states formed from the territories, belonging to the state by reason of its sovereignty, includes only the shores of the sea, and of its bays and inlets. Such lands called "marsh" or "tide" lands, are such as are covered and uncovered by the ebb and flow of the tide, but are susceptible of reclamation so as to be made valuable for agricultural and other purposes.[1] This doctrine of title by sovereignty also prevails in

Georgia, North Carolina and Virginia were accepted by the United States, and the municipal eminent domain held as a trust for the new states to be formed in conformity to the deeds of cession, the details of which were regulated by the act of congress known as the ordinance of 1787. Upon the admission of the new states nothing remained to the United States, according to the terms of the agreement, but the public lands, and upon their disposal the power of the general goverment over these lands, as property, also ceased, leaving the state in undisputed sovereignty, including the ownership and dominion of its navigable waters and the soil under them. See Pollard v. Hagan, 3 How. (U. S.) 212; Freedman v. Goodwin, 1 McAlister, 142; Ward v. Mulford, 32 Cal. 365; Farrish v. Coon, 40 Cal. 33; Barney v. Keokuk, 94 U. S. 336; Shively v. Parker, 9 Oreg. 504.

[1] People v. Morrill, 26 Cal. 336; Ward v. Mulford, 32 Cal. 365; Simpson v. Neil, 80 Pa. St. 183;

many of the inland states, and is applied to the navigable streams upon the borders and within the boundaries of the state.[1]

The state can make no disposition of the lands it thus holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of them for the purpose of promoting the interests of navigation, or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation.[2] The title to lands under tide waters within the realm of England was by the common law deemed to be vested in the king as a public trust to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it would become private property, but his grant was subject to the paramount right of public use, which he could neither destroy nor abridge. The laws of most nations have sedulously guarded the use of navigable waters within their limits against infringement, subjecting same only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right.[3] The title to land under tide waters in this country, which before the Revolution was vested in the king, became, upon separation of the colonies, vested in the states within which they were situated. The people of the state, in their right of sovereignty, succeeded to the royal title, and through the legislature may exercise the same powers which previously to the revolution could have been exercised by the king alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the constitution of the state and of the United States.[4]

Coburn v. Ames, 52 Cal. 385; Hinman v. Warren. 6 Oreg. 408; Pollard v. Hagan, 3 How. (U. S.) 212.

[1] Musser v. Hershey, 42 Iowa, 356; Barney v. Keokuk, 94 U. S. 324; Benson v. Morrow, 61 Mo. 345.

[2] Ward v. Mulford, 32 Cal. 365.

[3] People v. Ferry Co., 68 N. Y. 71. See Stewart v. Fitch, 30 N. J. L. 20; Storey v. Freeman, 6 Mass. 435.

[4] Lansing v. Smith, 4 Wend. (N. Y.) 9; Commonwealth v. Roxbury, 9 Gray (Mass.) 492.

Sources of original title.—While the proposition that the government is the source or fountain of individual title admits neither of question nor argument, yet it must be apparent, in the light of history, that even the government, state, federal or pre-national, must itself in some manner have acquired a right which had no existence prior to the year 1492. That to justify its claim of original ownership it must, in some manner sanctioned by law or the usage of nations, have become invested with the disposing power it has assumed to exercise.[1] Hence we find that in the economy of nations, with reference to territorial acquisition, there are four methods recognized whereby a sovereign title is created. These methods are classed as *occupancy*, *discovery*, *conquest* and *cession*, and through some of these various methods, directly or indirectly, has the title to all of the national domain of the United States been acquired.

Occupancy.—That immemorial occupancy confers upon the occupant a valid title to the land actually occupied is generally conceded by the laws of all civilized nations. Hence it is said the American Indian holds the right to use and enjoy his lands by virtue of prior occupancy. But though the Indian title by occupancy is respected by the courts until legitimately extinguished, yet such title, as construed and declared by our laws, does not extend to property in the soil, nor can it form the basis of any individual rights by reason of transfer from the aboriginal occupant. In the exercise of its sovereign prerogatives the government has ever reserved the exclusive right to extinguish this title by purchase or conquest.[2]

[1] With respect to the foundation of European title to the soil of America the student is referred to very full discussion by Marshall, C. J., in the celebrated case of Johnson v. McIntosh, 8 Wheat. (U. S.) 543.

[2] Johnson v. McIntosh, 8 Wheat. 543; Fletcher v. Peck, 6 Cranch, 87. Immediately after the inauguration of President Washington, he laid before congress a report from the secretary of war, acknowledging the Indian right of occupancy, and recognizing the principle of acquiring their claims by purchase for specific consideration according to the "practice of the late English colonies and government in purchasing the Indian

The only part of the United States where this title can in any proper sense be said to form the basis of a national right is the northwestern Pacific states, where it has been asserted by reason of the early explorations of Lewis and Clarke and the settlements by Astor and others, while some writers contend that this territory was part of the Louisiana purchase, and hence that the title is derived through cession. To a very limited extent also the titles of the colonial states rest on occupancy; for while such titles are generally referred to the early charters, yet, in many instances, the descriptions in the charters were very vague, indefinite and uncertain, and the royal titles, to which the states succeeded, were acquired through discovery, occupancy and conquest.

In the natural and proper meaning of the term as first above given, however, no part of the national domain can be said to rest on occupancy, or a time-immemorial possession. The Indian title by occupancy—and this is the only title that can really be classed under this head—is invaribly extinguished before the lands are disposed of,[1] and the fact

claims," and the rule in that respect laid down in the proclamation of October 7, 1763, by the king of Great Britian, interdicting purchases of land by private individuals from Indians, and declaring that "if at any time any of the said Indians should be inclined to dispose of said lands," the same "shall be purchased only" for the crown, the ultimate dominion and sovereignty being held to reside in the discoverer colonizing upon the continent. In accordance with this principle, beginning with the treaty of 1795, at Greenville, the Indian title of occupancy has been gradually extinguished by the United States in all of the states east of the Mississippi, and in nearly all of the states and territories west of same, leaving, in some cases, remnants of tribes, who have been invested by congress with allodial titles.

[1] During the earlier years of our national existence the Indian tribes of the United States were recognized, in some sense, as political bodies, and numerous treaties and negotiations were made with them on this basis. The relation, however, in which they stood to the general government was wholly unlike that sustained by any other two peoples in the world, and was marked by peculiar and cardinal distinctions which existed nowhere else. They were not regarded as foreign nations, in the sense in which that term is ordinarily employed, nor could they, with strict propriety, be called domestic nations, although that

of such extinguishment leaves the title of the government to rest on either conquest or cession.

Discovery.—It is fully in consonance with law and reason that he who discovers, or first finds, that which before was unknown, or to which there are no other or prior claimants, should be entitled to such ownership therein as the exigencies of the case will admit. In the case of an uninhabited country this rule would apply, and a valid title by discovery would vest in the nation whose citizens or subjects first occupied its soil.[1] The original European owners of America based their title on prior discovery; yet, with the exception of isolated tracts, all of the lands in the western hemisphere were, at the time of the landing of the first explorer, in the full and lawful possession of native races.

For the purpose of juridical inquiry and determination, however, the nations which first colonized the new world are held to have acquired a title to the parts actually or constructively occupied or claimed by them, by virtue of discovery and settlement.[2] Where the original claimant was unable to hold its possessions by force and arms, they passed under a new dominion, which held same by conquest, or if such original claimant sold or transferred its possessions by treaty or grant, the title in the successor became one of cession.

Conquest.—The title to a very large portion of the lands embraced within the territorial limits of the United States originated in conquest. Title by conquest is acquired and maintained by force—a principle to which all the fundamental ideas of law are violently opposed. But whatever the private and speculative opinions of individuals may be respecting a claim so derived, it is yet a title which the

term was, in one case at least, applied to them, (see Cherokee Nation v. Georgia, 5 Pet. U. S. 1.) They have always been regarded, however, as distinct, independent political communities, possessing and exercising many of the functions of nationality, and as retaining their original natural rights as the undisputed possessors of the soil. See Worcester v. Georgia, 6 Pet. (U. S.) 515.

[1] See Guano Co. v. Guano Co., 44 Barb. (N. Y.) 27.

[2] Johnson v. McIntosh, 8 Wheat. (U. S.) 543; Martin v. Waddell, 16 Pet. (U. S.) 367.

courts of the conqueror cannot deny; and however extravagant the pretension of converting the discovery of an inhabited country into a conquest may appear, yet if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if the property rights of the great mass of the community originates in it, then it becomes the law of the land, and cannot be questioned.[1]

Cession.—The immediate title to the great bulk of the lands of the United States is derived through cession, or grants from the various governments which, prior to such cession, claimed sovereignty and proprietary rights therein. It is true these rights were founded on occupancy, discovery, or conquest; but for the purposes of an orderly deraignment of title courts do not look beyond the deed of cession or inquire into the ceder's right to convey.

For all practical purposes, therefore, the state or federal governments are to be regarded as the sources of title, and their deeds of alienation, whether by grant or confirmation, considered the original root of title; yet, as we have seen, the titles thus granted or confirmed are in turn deducible from the rights and powers once asserted by the crowns of Europe, and are but a continuation, in lawful succession, of the possession of the original proprietors.[2]

[1] Johnson v. McIntosh, 8 Wheat. (U. S.) 543; Fletcher v. Peck, 6 Cranch (U. S.) 87.

[2] The title to our national domain comes, first, by discovery by the Cabots; second, by discoveries and colonization under grants, authorizations and charters from England, Holland, France, Sweden and Spain, and treaties and conventions thereafter; third, by Revolution in 1776, and confirmation through and by the definitive treaty of peace at Paris with Great Britain, September 3, 1783, whereby the Crown of Great Britain recognized the independence of the United States; fourth, by purchase from France of the province of Louisiana, April 30, 1803; fifth, by purchase from Spain of the East and West Floridas, February 22, 1819; sixth, by annexation of the republic of Texas, December 29, 1845; seventh, by the treaty of Guadalupe Hidalgo, February 2, 1848; eighth, by purchase from the republic of Mexico (the Gadsden purchase) of the Mesilla Valley, December 30, 1853; ninth, by purchase from the empire of Russia of Alaska, March 30, 1867; tenth, by

Derivation of National Titles.—England, Spain and France are the three primary sources of original title in this country, although both Holland and Sweden have left their impress, while Mexico, though possessing in fact only a derivative title, may for our present view, be classed as an original proprietor. Portugal, though a rival of England, Spain and France, does not seem to have ever obtained sufficient foothold upon any portion of the present territory of the United States to have left any appreciable traces.

The original title of the government to the great bulk of the territory East of the Mississippi is held under English grants and cessions, notwithstanding the vast area west of the Alleghanies, stretching from the lakes to the gulf, was formerly a French province under the name of New France. The French title was subsequently extinguished by treaty and cession, although numerous tracts, notably in Indiana and Illinois, are still held in private ownership directly under confirmed French grants. All of the territory west of the Mississippi, with the exception of Lewis and Clarke's discovery in the extreme north-west, is held under titles deducible from France, Spain and Mexico.

The ancient pre-national titles of private holdings east of the Mississippi have long been settled and are now seldom referred to save in the way of antiquarian research, but in many portions of the west, particularly in the territory included in the Mexican cession, they are still the subject of litigation.

It is a recognized principle in the law of nations that a change of government is never permitted to affect pre-existing rights of private property, and this principle has been embodied in all the treaties whereby cessions of territory have been made by other nations to the United States. With respect to pre-national titles to private holdings the foreign governments from whom same were derived will of course remain the source of title; with respect to all other titles the

annexation of the republic of Hawaii, 1898, and, eleventh, by cession from Spain of the island of Porto Rico, 1899. See Donaldson's Public Domain.

Federal or State governments are the source. If the pre-national title was perfect at the time of the cession it continued so afterwards and was in no way affected by the change of sovereignty.[1] But inchoate rights, which were of imperfect obligation, when confirmed by the United States become in fact American titles, taking their legal validity wholly from the act of confirmation and not from any foreign element which may have entered into their previous existence.[2]

ART. II. DERIVATIVE TITLE.

Generally considered.—At a very early period of legal development the elementary writers made an arbitrary division of the methods of acquiring title to real property by reducing same to two general forms. This division, sanctioned by long usage and judicial acquiesence, has been adopted by courts and jurists in this country, notwithstanding its admittedly unscientific character, and the title to all lands held in private ownership, as well as lands owned by the state or any of its municipal agencies under a derivative title, is referable to one or the other of these methods. They are termed respectively:

1. *Descent*, or that title which accrues through the death of one person to some other person nominated by law to receive such decedent's estate; and

2. *Purchase*, which comprehends every form of devolution of title except by descent.[3]

A more simple, and at the same time strictly accurate, division might be made if we were to say title to land is derived (1) by the act or operation of law, and (2) by the act

[1] United States v. Roselins, 15 How. (U. S.) 36; Strother v. Lucas, 12 Pet. (U. S.) 412.

[2] Dent v. Emmeger, 14 Wall. (U. S.) 308.

[3] Littleton defines purchase as follows: "Purchase is called the possession of lands or tenaments that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins but by his own deed," Litt. s. 12. Cruise says it is "where the title is vested by the person's own act and agreement" Cruise Dig. tit. XXIX. ch. 1.

or agreement of the parties; and every lawful method of acquisition could, with scientific exactness, be properly classed under one or the other of these heads. As it is, there is some confusion in the arrangement and development of the subject of title which is unavoidable under the present division. The strong conservative feeling which hesitates to introduce a new terminology has permitted many inconvenient and imperfect classifications to remain in our law, and of these the primary division of derivative title is a conspicuous example.

Sec. 1. Title by Descent.

Nature, operation and incidents.—*Hereditary succession* or *descent* is the title whereby one person, upon the death of another, succeeds to or acquires the estate of the latter by operation of law, the estate so derived being called the *inheritance.* The person from whom such estate is derived is called the *ancestor,*[1] and the person who succeeds to same is technically termed the *heir.* Such succession is called descent for the reason that by the terms of the feudal law upon the death of the tenant in fee, the land always descended and never ascended. Hence title by inheritance is in all cases called descent although, by statute, title may be taken by ascendants as well as descendants. It is further to be noted that the word "heir", in its technical signification, always means a person who takes land, or real property, although in its popular acceptance it is used to denote the takers of personalty as well. These latter, however, are more properly classed as "next of kin" and take as *distribu-*

[1] The term "ancestor" in common parlance is usually understood to mean a progenitor; but when used with reference to the decent of real property, it will be held to embrace all persons, collaterals as well as lineals, through whom an inheritance is derived. See Wheeler v. Clutterbuck, 52 N. Y. 67.

tees of the personalty, after the payment of debts,[1] by virtue of the statute of distributions.[2]

Heirs are said to take *per capita*, that is, direct, or in their own right as individuals, they standing in equal degree and receiving equal shares; or *per stirpes*, or by right of representation, as where the descendants of a deceased heir take the same share or right in the estate of another person that their ancestor would have taken if living.

Though of universal observance, inheritance is not a natural right, but purely statutory, and therefore arbitrary, absolute and unconditional. It is also a firmly established principle that the descent of real property is governed exclusively by the laws of the state wherein such property is situated, and, that the rights of all persons claiming as heirs must be measured and determined solely by such law. The domicile of the decedent is immaterial in such case, and its laws are effective only with respect of the personal estate.[3] It is a further established rule, that the law as it existed at the time of the ancestor's death must control in the distribution of his property, and, notwithstanding a statutory change has been made at the time a succession is claimed, his estate

[1] The attention of the student has heretofore been directed to the fact that in the civil law, and the systems derived from it, there is no such fundamental distinction between moveable and immoveable property as to necessitate a separate treatment of each. But the Common law, and all of the systems founded upon it, has distinct codes of law governing the succession to the two classes of property. In the United States a faint attempt at assimilation has been made by providing for the ultimate distribution of moveables, or personalty, through the same channels as the realty, and often in the same proportions, but the underlying principle of the Common law has not been changed and the rule still is that land shall go to the heir while chattels shall go to the administrator, who occupies, for the judicial settlement of the estate, the same position as the decedent would if living.

[2] The rights of kindred to participate in the personal estate of a deceased person are fixed and regulated by statute in all of the states. The basis of the statutes is the English statute of distributions of Charles II.

[3] Harvey v. Ball, 32 Ind. 98; Smith v. Kelley, 23 Miss. 167; Lingen v. Lingen, 45 Ala. 410.

will descend and vest in those only who by the law as it then existed are nominated as heirs.[1]

Nature of the Title.—For practical purposes descent is regarded as a new title, springing from the death of the ancestor, and when asserted must be so proved; yet in reality it is but a continuation of the ancestor's title which the law casts upon the heir at the moment of the ancestor's death.[2] The heir is regarded in law as a legal appointee to receive the title, and this appointment he can neither disclaim nor avoid.[3] Whenever the death of any person is shown, until rebutted, the presumption is that he died intestate,[4] and that his heirs take his estate under the laws of descent.[5]

It is quite common to hear people spoken of as heirs of persons still alive, yet, as we have seen, heirship is called into existence only by the death of the ancestor, therefore, no one can be an heir to a living person. One may be an heir presumptive or apparent[6] to another as a son is heir apparent of his father, but the term is a coloquial rather than a legal one and the condition, creating nothing more than a bare possibility, confers no legal rights. So, too, it is not uncommon to speak of persons as heirs who have taken the estate of a deceased person by last will. This is equally incorrect for, as has been stated, an heir always receives his appointment through operation of law and never through the act of the deceased. When the appointment is by deed or will the successors are not called heirs but *assigns*.

[1] Hosack v. Rogers, 6 Paige (N. Y.) 415.

[2] Marshall v. Rose, 86 Ill. 374.

[3] Wms. Real Prop. 75; 2 Black. Com. 201; 3 Wash. Real Prop. 6; Moore v. Chandler, 59 Ill. 466.

[4] The word "intestate" properly signifies a person who died without leaving a will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.

[5] Lyon v. Kain, 36 Ill. 362.

[6] An heir *apparent* is one whose right is indefeasable on account of his proximate relationship; thus a son is always heir apparent to his father. An heir *presumptive* is any remote kindred whose right may be defeated by the birth of a nearer relative; thus one may be heir presumptive to his brother who is without children.

All rights or interests, legal or equitable, vested or contingent, to which the intestate was in any manner entitled at his decease, except estates which come within the definition of chattels real, are valid subjects of descent, and pass to the heir.[1]

The title to the land of an intestate vests immediately in the heir, who forthwith holds same in his own right, subject, however, to the payment of the debts of the ancestor, or the fulfillment of his covenants. Hence, the estate is defeasible at the time, and becomes absolute only after the debts are extinguished.[2] But though the rights of the heir may afterward be divested by decree of the probate court and sale by the administrator, yet until such contingency he is the owner, and entitled to all rents, profits or other beneficial incidents flowing from the land.[3] Subject to the lien of the creditors, he may make any disposition of the land he may choose, and after due probate and administration, together with an extinguishment of the debts, the title becomes perfect in him or his assigns.[4]

An heir is under no legal liability to discharge the debts of his ancestor from whom he takes real estate, except where the personal estate of such ancestor is insufficient to pay same,[5] and creditors, in the first instance, must resort to the personal representatives, before seeking satisfaction of the heirs.[6] After having accepted the succession, they become

[1] The statute usually defines the subjects of inheritance, but the above is the substance of the statute as generally enacted.

[2] Walbridge v. Day, 31 Ill. 379; Chubb v. Johnson, 11 Tex. 469.

[3] Foltz v. Prouse, 17 Ill. 487; Gibson v. Farley, 16 Mass. 280.

[4] Vansyckle v. Richardson, 13 Ill. 171; Austin v. Bailey, 37 Vt. 19.

[5] McLean v. McBean, 74 Ill. 134; Woodfin v. Anderson, 2 Tenn. Ch. 331. Though customary, it is not accurate to say that lands descending to heirs are charged with the debts of the ancestor. The lands are liable only to be charged with the payment of debts upon a deficiency of personal assets; and this right may be lost by delay. Bishop v. O'Connor, 69 Ill. 431.

[6] Mix v. French, 10 Heisk. (Tenn.) 377.

personally liable for the debts of the ancestor,[1] but only to the extent of what descends to them from such ancestor.[2]

So, too, heirs are not bound by the covenants of their ancestor, further than the real estate descended to them, and the amount of their distributive shares of the ancestor's personal estate.[3]

Title by descent accrues to the heir by virtue of some legal relation which he sustained to the ancestor, and such title may be derived:

(1) Through consanguinity.

(2) Through affinity.

(3) Through adoption.

The law which governs the order of succession through these various channels is known as the *rules of descent.* At common law these rules were called "canons of inheritance," and were of a very complex character.[4] The "canons" of the common law have no application in the United States, but rules have been established in every state which regulate the line of succession and declare who, under certain conditions, shall be the heir. These laws, while preserving a

[1] Succession of Bougere, 28 La. Ann. 743. The debts chargeable upon lands descended are those contracted by the decedent owner, not those incurred by his representatives in the course of Administration. Allen v. Poole, 54 Miss. 323; Porterfield v. Taliaferro, 9 Lea (Tenn.) 242.

[2] Payson v. Hadduck, 8 Biss. (C. Ct.) 293; Williams v. Ewing, 31 Ark. 229; Branger v. Lucy, 82 Ill. 91.

[3] Holden v. Mount, 2 Marsh. (Ky.) 189; Miller v. Bledsoe, 61 Mo. 96.

[4] There were seven common-law canons of descent to the effect: 1, that inheritance should always descend lineally, and never ascend lineally; 2, that males are always preferred to females; 3, of two or more males of equal degree, the eldest only should inherit, but females altogether; 4, that lineal descendants *in infinitum,* of any person deceased, should represent their ancestor; 5, on failure of lineal descendants, the inheritance should descend to the collateral relations, being of the blood of the first purchaser, subject to the three preceding rules; 6, the collateral heir of the person last seized must be his next collateral kinsman of the whole blood; 7, in collateral inheritances, the male stock should be preferred to the female, unless where the lands had, in fact, descended from a female. 2 Black. Com. 208, 234.

substantial agreement in their general outlines, differ materially in detail, and it is doubtful if any two of them are exactly alike.

But while there is a wide diversity of detail in the statutes of the different states, yet it may be stated generally that five well-defined principles relative to the succession are discernible. The descent in accordance with these principles is as follows: Real estate of an intestate descends (1) to his lineal descendants, except where a surviving consort is allowed to participate; (2) to his father, varied in some cases by a participation of brothers and sisters; (3) to his mother, varied as before by collateral participation; (4) to his collateral relatives; and (5) to the state by escheat. These five elementary principles are covered by a network of conditions and provisos, differing more or less in every state, and the application of these conditions governs the descent, and directs it into some one of the channels above enumerated. In all cases not provided for by statute, the inheritance descends according to the course of the common law.

(1) *Title by Descent through Consanguinity.*

Definition and nature.—The origin of hereditary succession is veiled in the deepest abscurity. A few isolated conclusions are all that have been arrived at by inquirers.[1] In England the actual state of the law cannot be described with any degree of accuracy for any period earlier than the time of Henry II. But about this time it may be said to have become settled law that all land descended to the eldest son, or to the son of the eldest son if that person should die in the lifetime of his father; and further, that in default of direct descendants, collaterals, and their representatives, might be allowed to participate.[2] This order of succession grew out of the principles of the feudal law, whereby the heir, because of his relation to the ancestor or first purchaser, was permitted to occupy the feud by virtue of the terms of

[1] Markby, Elements of Law, 403. [2] Reeves, Hist. Eng. Law, ch. 2, *passim.*

the original grant. The modern doctrine of descent, while discarding the ancient feudal principle, still conforms to the old ideas of kindred, or alliance in blood.

The relation subsisting among all the different persons descending from the same stock or common ancestor is called *consanguinity*, and is the medium through which, in the descent of real property, the several degrees of kindred are computed and deduced. Consanguinity is *lineal* or *collateral;* the former being the relation which exists among persons where one is descended from the other, as between father and son, in the direct line of descent; the latter is the relation subsisting between persons descended from the common ancestor, but not from each other, as between brother and sister. The several stages by which one person connects himself with an ancestor or through which he establishes the fact of relationship, is called a *pedigree.*

Tracing Descent — Degrees of Consanguinity. — There are two methods of computing the degrees of consanguinity, known respectively as the *civil* and *common-law* methods, the latter being also the same as the *canon* law. The rule of the civil law is generally used in this country, and is preferable, for that it points out the actual degree of kindred in all cases. This mode of computation begins with the intestate, and ascends from him to the common ancestor, and descends from such ancestor to the next heir, reckoning a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. According to this rule of computation, it will be seen the father of the intestate stands in the first degree, his brother in the second, his nephew in the third, etc. By the common-law method of computation, different relations may stand in the same degree, and the degrees are counted the same whether lineal or collateral. The mode of the common and canon law is to discover the common ancestor, and beginning with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. By this means the father and brother of the intestate, or

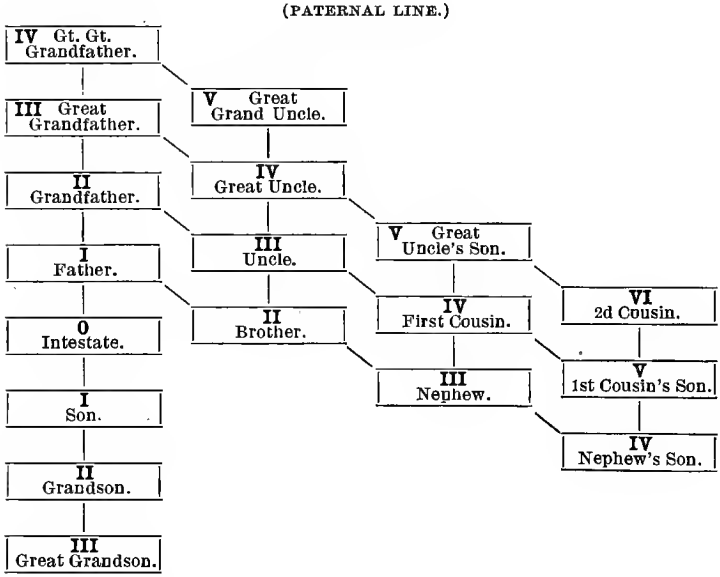
person proposed, stand in the same degree. By the civil law the father stands in the first degree, the brother in the second. So by the common law the first cousin [1] stands in the second degree; by the civil law he would stand in the fourth.

The line of ancestry is classed as *ascending* or *descending*, taking the person proposed as the unit, and is further classified as *paternal* or *maternal*, according as the examination may lead through the father or the mother.

The following diagram will serve to illustrate the degrees of consanguinity according to the civil law:

DEGREES OF CONSANGUINITY ACCORDING TO THE CIVIL LAW.

(PATERNAL LINE.)



[1] Cousin (*consanguineus*) means kinsmen, in general; hence it really includes brothers and sisters, as well as those whom we usually call cousins. Littleton, and other of the old writers almost invariably use the term in this sense.

The Right of Succession—Proof of Heirship.—Title by inheritance accrues only to the issue of lawful wedlock,[1] and can be asserted only by those persons who can bring themselves within the line of succession provided by the statute. To successfully assert title, therefore, it is necessary for the heir to show: (1) the death of the ancestor, and lawful seizin in him of the subject-matter of the title at the time of such decease; (2) the marriage of his parents; and (3) proof of his legitimacy. These three points satisfactorily established, the law will invest him with title to such portion of the ancestors's estate as, under the statute, he is entitled to take. All the presumptions of law, however, are in favor of legitimate birth.[2]

Continued — Illegitimates.—By the stern rules of the common law an illegitimate child, that is, one born out of lawful wedlock, is not kindred of any one;[3] he can neither acquire nor transmit rights of inheritance, except with respect to his own lineal descendants lawfully begotten, and if he dies intestate and without issue his property escheats to the state. To avoid the unfortunate consequences flowing from such a condition the law now presumes that every child is the offspring of a lawful, rather than a meretricious, union of the parents, and, in the absence of negative evidence, no supplemental proof of legal marriage is necessary.[4]

In the United States the rule of the common law nowhere prevails in all of its original severity. A more humane and enlightened course has been generally adopted, and while the principles which control the common-law doctrine have not been infringed, yet the practical applications of those principles have been greatly modified. As a general rule, an illegitimate will inherit from its mother equally with her other children by a lawful marriage, and the mother will in-

[1] Blacklaws v. Milne, 82 Ill. 505.

[2] Fox v. Durke, 31 Minn. 319.

[3] *Nullius filius*, that is, nobody's son, is the term by which this class of persons is designated. A child born out of wedlock is also known as a *bastard*.

[4] See Fox v. Burke, 31 Minn. 319; Orthwein v. Thomas, 127 Ill. 554.

herit from the bastard in default of lawful issue.[1] In many states rights of inheritance have been still further extended.[2]

Continued—Legitimation.—But notwithstanding that a child is born out of lawful wedlock it may still be a lawful heir by a process known as *legitimation*, or the subsequent marriage of the parents. The general statutory rule now is that an illegitimate child may become legitimate by the subsequent marriage of the parents and hence enabled to assert all the rights of an heir.

With regard to the extra-territorial effect of legitimation the courts do not seem to be altogether agreed and it has been suggested that the matter occupies comparatively the same position as adoption or other rights created by statute in derogation of the common law, and that if opposed to local laws or policy it will be unavailing. The better opinion, however, and that sustained by the volume of authority, is, that when an illegitimate child has, through the subsequent marriage of its parents, become legitimate by virtue of the laws of the state or country where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere and entitled to all the rights flowing from the status, including the right to inherit.[3]

Posthumous Children.—A person born after the death of its father is called a *posthumous* child. An heir may lawfully claim by descent even though born after the death of his immediate ancestor; this was always the rule of the common law, while the statute has in many states extended the same by an express provision that, a posthumous child, born alive, shall be considered as living at the decease of the parent. Indeed this may now be considered the general doctrine observed in the United States, for where an express enactment is wanting the rule is necessarily implied in other statutory provisions.[4]

[1] Miller v. Williams, 66 Ill. 92; Brewer v. Blougher, 14 Pet. (U. S.) 178.

[2] Consult local statutes.

[3] A very interesting illustration of this topic will be found in the case of Miller v. Miller, 91 N. Y. 315; and see, Ross v. Ross, 129 Mass. 243.

[4] See Morrow v. Scott, 7 Ga. 535; Smith v. McConnell, 17 Ill. 135.

The test of legitimacy, however, applies with the same force as in case of other children, and in addition to the facts which decide the question in ordinary cases it is necessary that the posthumous child be born within the natural period of gestation, counting from the death of the ancestor. The old rule was, that such child must be born within nine months, or forty weeks after the death of the husband,[1] but the severity of the old rule has been much relaxed in modern times owing to the increase of physiological knowledge. While this period is still considered as the usual time courts will, nevertheless, exercise a discretion in allowing a longer time when the circumstances of the case or the opinions of physicians seem require it.

Collateral Heirs.— To prove heirship in a collateral line, the party must show the descent of himself and the person last seized from some common ancestor, and the extinction of all those lines of descent which would claim before him.[2] It was formerly the rule, in collateral inheritances, that kindred of the half-blood could not inherit from each other; that is, if a man were to die, seized of lands but without issue, his half-brother could not inherit from him. In such case, if there were no kinsmen of the whole blood, the land escheated to the lord. This rule has long been abrogated, and kindred of the half-blood now inherit equally with those of the whole blood in the same degree, except where the inheritance is ancestral.[3]

Ancestral Estates — Half-blood.— A marked provision may be observed in the statutes of descent of all the states in relation to ancestral estates, and the exclusion of all persons who do not partake of the blood of such ancestor. The clause in question provides, in substance, that in case an inheritance comes to an intestate by descent, devise or gift of one of his ancestors, all those not of the blood of such ances-

[1] See Cruise Dig. tit. XXIX. ch. 2.

[2] Emmerson v. White, 29 N. H. 482.

[3] Kindred of the half-blood are either *consanguineous* or *uterine*, the former when children of the same father but different mothers, the latter when children of the same mother but different fathers.

tor shall be excluded from such inheritance; and the rule observed by the courts is general that only persons of ancestral blood can inherit ancestral estates.[1] The current of later decisions, however, is uniform in declaring that the rule has reference to the immediate ancestor from whom the intestate received the inheritance, and not a remote ancestor who was the original source of title.[2]

The right of representation.— This is the right of the lineal descendants to take the portion which their ancestor would have taken, and is called inheritance *per stirpes*,[3] or by stock. It is a statutory right, and, by reason of the diversity of the statutes of the different states, no positive rule can be stated. Generally, if one of several children shall have died before the ancestor, the heirs of such child will take the portion which would have descended to it if it had survived the ancestor,[4] and the same rules apply in determining who are the heirs of such child as in any other case of descent. In a few states, where an intestate leaves grandchildren, or nephews and neices, only, they all take *per capita*, or in their own right;[5] but as a rule of more general observance, the lineal descendants represent only their ancestor.[6]

Preferences.— By the common-law canons of descent males were preferred before females, the eldest male taking in preference to others of equal degree, and females equally, while in collateral inheritnaces the male stocks were always preferred to the female, except where, in fact, the lands had descended from a female. This has all been abolished by the statutes of descent, which provide in all cases for equal par-

[1] Campbell v. Ware, 27 Ark. 65.

[2] Buckingham v. Jacques, 37 Conn. 402; Curran v. Taylor, 19 Ohio, 36; Cramer's Appeal, 43 Wis. 167.

[3] Literally, by the root.

[4] Dodge v. Beeler, 12 Kan. 524; Crump v. Faucett, 70 N. C. 345.

[5] Cox v. Cox, 44 Ind. 368; Eshleman's Appeal, 74 Pa. St. 42. Compare Harris' Estate, 74 Pa. St. 452.

[6] This is somewhat in accordance with the fourth canon of inheritance at common law, only by the application of that rule descendants of a person deceased *in infinitum* represented their ancestor, and only when the representation failed were the lineal descendants of the intestate's next of kin permitted to come in.

ticipation among the members of a class; and the right of primogeniture, if it ever existed in this country, is now unknown.

Aliens.—The insular narrowness of the old English law permitted those only to take by inheritance who were natural born subjects of the realm, or had been naturalized by act of parliament, or made denizens by royal patent. In the United States the early laws all partook of the same exclusive character and inheritance was long confined to citizens. While aliens were permitted to take, hold and transmit by deed they were expressly declared incapable of taking lands by descent or other mere operation of law; and because an alien could have no inheritable blood through which title could be deduced, a citizen was precluded from asserting a title so derived. In case of the death of an alien owning lands, or of a citizen without other than alien heirs, the lands of such persons escheated to the state.[1] Private laws were often passed to enable individuals to receive and transmit title, and the effect of such laws was to invest the person mentioned with inheritable blood and to enable him to convey or devise his property and to transmit by descent in all respects the same as a citizen of native birth,[2] but not to remove the barrier against alien heirs. In time, however, a more liberal policy was inaugurated, the tendency of which was to remove the old restrictions, and as a result we find that in many states, so far as respects the acquisition and descent of land, the alien and citizen stand on an equal footing.[3]

The legislation on this subject has been extremely diversified and laws respecting same are constantly being changed or modified.

Coparceners.—Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate,

[1] Craig v. Radford, 3 Wheat. 363; Doe v. Governeur, 11 Wheat. 352; Jackson v. Green, 7 Wend. 333; Levy v. Levy, 6 Pet. 102. This extended as well to the estates of dower and curtesy. Mick v. Mick 10 Wend. 379.

[2] Parish v. Ward, 28 Barb. 328.

[3] See McConville v. Howell, 17 Fed. Rep. 104; Parish v. Ward, 28 Barb. (N. Y.) 328.

are called *coparceners*. Formerly in England the term included all persons, and such is its legal signification in America, but its present use in England is confined to females. The distinction between coparcenary and tenancy in common is virtually abolished in the United States, and the general rules relative to tenants in common have the same application whether the common property be derived by descent or by purchase.

(2) *Title by Descent through Affinity.*

Defined and distinguished.—The relationship or connection arising in consequence of marriage, which exists between each of the married persons and their kindred, is termed *affinity*, and is distinguished from consanguinity, which is used to denote the ties of blood. At common law the relationship of affinity is not sufficient to obtain legal succession or inheritance, but by statute, in most of the states, the surviving husband or wife has been endowed with inheritable qualities, and may take as heirs of each other according to the prescribed rules of descent.

It is true that husbands and wives are in no sense of the word "next to kin" to the other; but, inasmuch as heirship is peculiarly a creation of the statute, it is fully within the sovereign power of the state to make a surviving husband or wife, as well as a child, an heir, and this has been directly or indirectly accomplished in a number of localities.[1] In the sense that an heir at law is simply one who succeeds to the estate of a deceased person, the wife is an heir of her deceased husband.[2]

In default of lineal kindred in the descending line, a widow is now generally permitted to participate in the inheritance, and when so permitted she is strictly an heir. The right of dower has also been radically changed in a few states, so that instead of the use, during life, of a portion of the husband's estate, the fee to a specific quantity vests abso-

[1] May v. Fletcher, 40 Ind. 577; Dodge v. Beeler, 12 Kan. 524; Ringhouse v. Keever, 49 Ill. 470.

[2] McKinney v. Stewart, 5 Kan. 384; Steel v. Kurtz, 28 Ohio St. 192.

lutely in the widow upon his death; and though it will require no small amount of astute reasoning to discover wherein such procedure does not constitute a descent, yet the courts of such states, in view of the fact that the statute declares that she shall be "entitled," etc., have decided that the widow does not take by descent, as an heir, but by virtue of her marriage relation, as a widow.[1]

(3). *Title by Descent through Adoption.*

Defined and distinguished.—It is a cardinal rule of the law of inheritance that no person shall be permitted to succeed to an estate as an heir who does not partake of the blood of the ancestor. Indeed it may be said that this is the vital principle of hereditary succession and upon its maintenance depends the entire doctrine of descent. But within comparatively recent years an important innovation has been made in this old rule growing out of the doctrine of *adoption.* This is a juridical act creating between two persons certain relations, purely civil, of paternity and filiation.

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the common law, although long recognized by the civil, and is of comparatively recent date in the United States. The act of adoption is the creation of an artificial relation, made in conformity with and regulated by positive statute, and in the light of which the new rights and obligations thus derived are to be solely construed.[2] There is a lack of uniformity in the statutes enacted by the states, but in the main they agree in conferring on the person so adopted the rights of inheritance and succession, and other legal consequences and incidents of the natural relation of parent and child, the same as if such child had been born in lawful wedlock of such parents by adoption, but, as a rule, restrict such child from taking property expressly limited to the body or bodies of the parents by adoption, and usually from taking from the lineal or col-

[1] Brannon v. May, 42 Ind. 92. Long v. Hewitt, 44 Iowa, 363;
[2] Keegan v. Geraghty, 101 Ill. 26; Tyler v. Reynolds, 53 Iowa, 146.

lateral kindred of the parents by right of representation. Indeed the right of inheritance thus secured is generally strictly confined to the adopted parent, and precludes an inheritance from the actual children of such adopted parent;[1] while the right of inheritance by the adoptive parents from the child is confined to such property as he had received through them, and, as a rule, they are expressly prohibited from inheriting any property which the child received from his own kindred by blood.[2] As against the adopted child, the statute should be strictly construed, being in derogation of the general law of inheritance, which is founded on blood relationship, and is a rule of succession according to nature which has prevailed from time immemorial.

The rights of inheritance acquired by an adopted child under the laws of a particular state are recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy;[3] but in the absence of statutory directions, the general rules of descent must govern as in other cases.[4] Where the rights of an adoptive heir acquired in one state are recognized in another, his inheritable capacity must be measured by the laws of the state where the land is situate, and not by those of his late ancestor's domicile, or the state conferring inheritable blood.

The right of succession.— Where land is claimed by descent and the heir is such by adoption and not by blood, before such title can be asserted over other claimants the right of succession must be established in some legal manner. This would be accomplished by the decree of adoption. The right of adoption as previously stated, is not of common-law origin, but seems to have been borrowed from the civil law, and in every instance is purely statutory. It is necessary, therefore, that the facts essential to the exercise of this special jurisdiction should be shown by the record; and to

[1] Barnhizel v. Ferrell, 47 Ind. 335; Keegan v. Geraghty, 101 Ill. 26.

[2] Keegan v. Geraghty, 101 Ill. 26. See also, Reinders v. Kappelmann, 68 Mo. 482.

[3] Ross v. Ross, 129 Mass. 243.

[4] Reinders v. Kappelmann, 68 Mo. 482.

give a decree of adoption any force or effect the court pronouncing same must, as a rule, have acquired jurisdiction (1) over the persons seeking to adopt the child; (2) over the child, and (3) over the parents of such child.[1] In other words, the statute must in all cases be complied with;[2] its terms and conditions must be fulfilled; and if the specified requisites[3] are not performed, then the act is incomplete and the child cannot inherit from the parent by adoption.[4] Where the statute provides specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way.[5]

Sec. 2. Title by Purchase.

Defined and classified.—As previously remarked, *purchase* is a generic term which includes every legal method of acquiring an estate except by inheritance. With few exceptions neither law-writers nor courts ever seem to have ventured upon a more extended definition,[6] if indeed one can be framed, and that just given has come down unchanged from Blackstone, who in turn borrowed it from earlier writers.[7]

In its popular acceptation purchase is a method of acquisition by way of barter or sale for a money or other valuable consideration. But in law, while it still retains this restricted meaning, it has the further broad signification given in the opening of this paragraph, and whether land be acquired

[1] Ferguson v. Jones, 17 Oreg. 204.

[2] Tyler v. Reynolds, 53 Iowa, 146; Keegan v. Geraghty, 101 Ill. 26.

[3] Usually the consent of the parents or surviving parent of the child is required, and if the child is over the age of consent, its own consent as well. Where these requisites are specified they are vital.

[4] Luppie v. Winans, 37 N. J. Eq. 245; Foster v. Waterman, 124 Mass. 592.

[5] Shearer v. Weaver, 56 Iowa, 578.

[6] Some writers have followed Littleton and described it as a method of title resulting from the agreement of the parties but this is far from being technically accurate.

[7] Coke, Litt. 18b; 2 Black. Com. 241; 3 Wash. Real Prop. 4.

by gift or sale, by deed or devise, it is, in contemplation of law, a *purchase*, and the person taking the land is technically called a *purchaser*.

Two general methods of acquiring title by purchase are recognized,[1] and these we may classify respectively as:

1. Title by act of the parties.
2. Title by operation of law.

This primary division or classification is susceptible of a number of divisions and subdivisions, defining particularly the channels through which title may flow, which will be fully illustrated in the succeeding paragraphs.

1. *Title through Act of the Parties.*

Where title accrues through the act or agreement of the parties, the operative instrument of conveyance becomes effective either:

(1) In the life-time of the grantor, when the title is said to be by *grant* or *deed*, or

(2) At the instant of his death, in which event the title is said to be by *devise*.

It is through this general division that ownership of the great bulk of all of the lands in the country is derived. In the following paragraphs only the general features of these forms of title will be considered, the incidents of the operative instruments which create same being reserved for the subsequent chapters on conveyances.

(1) *Title through Act of the Parties by way of Grant.*

Generally considered.—According to the old law a grant applied only to those things which, by reason of their in-

[1] Blackstone, and many of the elementary writers who have adopted his terminology, give five methods of acquiring title by purchase, viz.; Escheat, Occupancy, Prescription, Forfeiture, and Alienation. Mr. Washburn, as well as other American writers, has followed this classification. Occupancy, in the sense in which it is used by English writers is unknown in this country. The classification given in the text has the merit of simplicity and permits of a more scientific distribution of sub-heads than was possible under the old system.

tangible nature, were incapable of actual delivery or livery of seizin. Hence it was in respect of incorporeal property only, that title was deduced in this manner. But deeds having long superseded the ancient livery, all property is now the subject of grant.[1] Title by grant is deduced either through

(*a*) public grant, or

(*b*) private grant,

The former being the act or deed of the sovereign power, the latter the exercise of individual volition. Partaking of the general nature of grant is a further form of title known as

(*c*) confirmation,

Applicable either to public or private acts of divesture.

In the technical description of the parties to a grant the person making the same is called the *grantor*, the person receiving it the *grantee*. These descriptions are used generally to indicate the parties to all transactions by way of purchase except in the case of wills. All persons taking title by grant in any form are further known as *assigns*.

(a) *Public Grant.*

Patent.—The original divesture of title by the government, either state or national may be effected in a variety of ways, either of which will be sufficient for the purpose intended. The usual method is by what is known as a *patent*, or a deed issued in conformity to prescribed legal formalities. A patent is a complete appropriation of the land it describes,[2] and passes to the grantee, or, as he is sometimes styled, the *patentee*, all the interest of the State or the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface; in short, in everything embraced within the

[1] 4 Kent Com. 494; Wms. Real Prop. 147; 1 Wash. Real Prop. 181.

[2] Stringer's Lessee v. Young, 3 Pet. 320.

term "land." [1] It is conclusive evidence of the right of the patentee to the land described therein, not only as between himself and the government, but as between himself and a third person who has not a superior title from a source of paramount proprietorship.[2] When issued to a confirmee of a foreign grant, it operates like the deed of any other grantor, and passes only such interest as the government possessed, the deed taking effect by relation from the initiation of the series of proceedings for confirmation, and of which it forms the last act.[3]

The government of the United States has a perfect title to the public lands and an absolute and unqualified right of primary disposal. Neither state nor territorial legislation can in any manner modify or affect this right; nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.[4] Whether title to a portion of the public lands has passed from the United States depends exclusively upon the laws of the United States; when it has passed, it then becomes subject to state laws.[5] These statements acquire additional importance from the fact that in a majority of the western states the entry, or preliminary

[1] Fremont v. Flower, 17 Cal. 199. According to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under a general designation of lands or mines. It has sometimes been asserted that this prerogative right passed to or was inherent in the states, but this is an error. The *jura regalia* which pertained to the king at common law comprehended not only those rights which relate to the political character and authority of the sovereign, but also those which are incidental to his regal dignity, and may be severed at pleasure from the crown and vested in the subject. It is only to the rights of the first class that the states by virtue of their sovereignty are entitled, and mines of the precious metals belong to the second class. Moore v. Snow, 17 Cal. 199.

[2] Waterman v. Smith, 13 Cal. 373.

[3] Yount v. Howell, 14 Cal. 465.

[4] Union Mill, etc. Co. v. Ferriss, 2 Sawyer, 176; Gibson v. Chouteau, 13 Wall. 92.

[5] Wilcox v. Jackson, 13 Pet. (U. S.) 498; Moore v. Robbins, 96 U. S. 530.

measure, has been recognized as the basis of a legal title, and in actions of ejectment has frequently been received as such; but in the federal courts the patent is held to be the foundation of title at law, and neither party can bring his entry before the court.[1]

A purchaser from one holding under a patent is not bound to look behind the patent to learn if it was properly issued to the one entitled to it,[2] for the instrument is in itself presumptive evidence that all prior proceedings are legal;[3] but every purchaser is presumed to have notice of any defect of title apparent upon its face,[4] and is chargeable with notice of whatever the patent recites.[5] A patent issued to a fictitious person is a nullity,[6] but the heirs of a deceased person will take a valid title to the land so conveyed to a deceased ancestor.[7]

In the colonial states and the territory claimed by them, as well as in the state of Texas, the original and paramount source of title is the state. In all the states formed from national territory, except as the sovereign prerogative over submerged land has been asserted, the patent from the state is only a mesne conveyance of an older and pre-existent title, depending for its validity upon the preliminary steps by which the state acquired ownership to the soil. In tide-water states, notably Alabama, California and Oregon, where the doctrine of original title in marsh and submerged lands by virtue of sovereignty, has been strongly asserted, a state patent or grant may in some cases form the foundation of an unassailable title; but in the interior, as well as in states bordering on the Great Lakes, where no perceptible tide is found, the state, while exercising dominion over its water-ways, has usually conceded the ownership in the soil covered thereby to the adjacent riparian proprietor, who

[1] McArthur v. Browder, 4 Wheat. 488; Fenn v. Holmes, 21 How. 481.

[2] Schnee v. Schnee, 23 Wis. 377.

[3] Barry v. Gamble, 8 Mo. 88; Winter v. Crommelin, 18 How. 87; Stringer v. Young, 3 Pet. 320.

[4] Bell v. Duncan, 11 Ohio, 192.

[5] United States v. Land Grant Co., 21 Fed. Rep. 19.

[6] Thomas v. Wyatt, 25 Mo. 24.

[7] Galloway v. Finley, 12 Pet. (U. S.) 26.

would hold, whatever may be the mesne conveyances, from the United States in virtue of the original divesture by patent, grant, or otherwise.

Legislative act.—The United States or a state may make a grant of land by a law as effectually as by a patent issued in pursuance of a law. In the former case it is the direct act of the government through the legislature, in the latter it is a ministerial act under the direction of the legislature.

A confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands,[1] and, where one is in possession of lands a resolve of the legislature, releasing them to him, passes a title without any further act, except performance of the conditions, if any.[2] An act of congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates *ipso facto* to vest the title in the grantee;[3] but if the grant be coupled with a condition, it will not operate to vest the title until such condition has been complied with.[4] An act of congress granting land to one person is higher evidence of title than a patent of the same land subsequently issued by the officers of government to another person, and cannot be defeated by such subsequent patent.[5] Thus, titles derived from the state to lands selected under the "swamp grant" will take precedence over patents from the United States issued subsequent to the date of the granting act.[6]

Legislative grants and confirmations are generally followed by patent, the issuance of which is usually specially provided for in the granting act; yet the patent in most cases adds nothing to the force of the grant, but is merely confirmatory of what has preceded. If a claim be made to

[1] Challefoux v. Ducharme, 4 Wis. 554; Dean v. Bittner, 77 Mo. 101; Hall v. Jarvis, 65 Ill. 302; Langdeau v. Hanes, 21 Wall. 521; Strother v. Lucas, 12 Pet. 411; Field v. Seabury, 19 How. 323.

[2] Mayo v. Libby, 12 Mass. 339; Ryan v. Carter, 93 U. S. 78.

[3] Ballance v. Tesson, 12 Ill. 327; Grignon's Lessee v. Astor, 2 How. 319.

[4] Thompson v. Prince, 67 Ill. 281.

[5] Dousman v. Hooe, 3 Wis. 466; Megerle v. Ashe, 27 Cal. 322.

[6] Ruigo v. Rotau, 29 Ark. 56; Keller v. Brickley, 78 Ill. 133; Railroad Co. v. Brown, 40 Iowa, 333; Daniel v. Purvis, 50 Miss. 261.

land with defined boundaries, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.[1] Analogous to the rule which obtains in case of patents, where there are two confirmations or grants of the same land the elder must prevail and will give the better title.

The governmont, like an individual, has no power to withdraw or annul its grant; the first, if lawful, must stand, and the second cannot operate as a conveyance, for the reason that the grantor, when it was made, had no estate to convey.[2]

(b) *Private Grant.*

Deed.—The surrender or conveyance of lands from one person to another is called *alienation*, and the legal evidence of such alienation is termed a *deed*—a name of very ancient origin and extensive signification.

Where a deed results from the free act or agreement of the parties the transaction is a *voluntary* alienation. Where same is given as an enforced act, either by the owner of the land or some person acting for him, it is an *involuntary* alienation. Thus, deeds executed to evidence a gift or in pursuance of a sale, are familiar examples of voluntary alienation; those executed in conformity with a decree or order of court, or by the sheriff in satisfaction of a judgment, would be classed as involuntary alienations.

Title by deed is the most common form of purchase, and that by which the great bulk of all the real property in the country is held. The term "deed" is very comprehensive, and denotes not only all classes of instruments for the con-

[1] Langdeau v. Hanes, 22 Wall. (U. S.) 521; Swann v. Lindsey, 70 Ala. 507; Dean v. Bittner, 77 Mo. 101.

[2] Willot v. Sanford, 19 How. (U. S.) 79.

veyance of real estate, but any instrument in writing under seal, whether relating to land or any other matter. In its popular acceptation, however, it is confined to conveyances of land, or estates or interests therein, and is still further restricted in its meaning to absolute alienation, as distinguished from mortgages, indicating conditional alienation, though the latter are as essentially deeds as the former. In its broad signification it is the highest form of expression of derivative title known to the law.

Anciently a distincton was made between deeds of feoffment and deeds of grant, the former relating to corporeal and the latter to incorporeal property, but this distinction no longer exists; and, generally speaking, all deeds now in common use are deeds of grant.[1]

There is a further distinction in this connection between deeds and conveyances made by persons in their own right and those made by fiduciaries and officers acting under a power. This latter mode of acquiring title has by some writers been classed as a distinct method under the name of "title by *office grant;*"[2] but while the name "official grant" quite fully and clearly defines the character of such conveyances, they yet constitute but one form of title by deed.

So, too, it is not uncommon to find title classified as by "execution," by "decree," etc., but such classifications are misleading and sometimes erroneous. Under sales by virtue of executions or decrees the purchaser acquires no legal estate in the land sold, but only the right to a conveyance in case the sale is confirmed and no redemption is had.[3] Prior to deed the right to the possession and profits of the land remains with the debtor, while the equity held by the purchaser is practically but a lien thereon for the amount of his bid.[4] In all cases where a redemption is permitted, the legal estate of the judgment debtor is not divested by the sale

[1] See Dudley v. Sumner, 5 Mass. 438.

[2] See 2 Wash. Real Prop. 209; 4 Kent, Com. 428.

[3] Smith v. Calvin, 17 Barb. (N. Y.) 157; Evertson v. Sawyer, 2 Wend. (N. Y.) 507; Bowman v. People, 82 Ill. 246.

[4] Vaughn v. Ely, 4 Barb. (N. Y.) 159.

until after the period allowed for redemption has expired, nor even then, unless the sale has been consummated by a deed from the proper officer.

Whether the alienation be voluntary or involuntary the title acquired by the grantee is the same. If the conveyance results through a sale on execution, while the sheriff is the ostensible grantor, yet the estate conveyed is that of the judgment debtor and the title thereby acquired is, to all legal intents, as valid and effectual as though it had been the act of the debtor himself by a deed in proper form.

Dedication.—Where lands are set apart or surrendered by the owner for some public use, the act is termed a *dedication.*[1] In such event the public at large, and not merely a public corporation, society, or individuals, must be the chief beneficiary;[2] and, properly speaking, there can be no valid dedication to private uses.[3] It would seem, however, that a dedication for the use of a limited portion of the public may still be valid as a *charitable use*,[4] and, if so made that the holder of the estate becomes a trustee for the purposes of the charity, will be effectual for the purpose intended.[5]

It is by this title that much of the land used by the public for streets, highways, parks, squares, etc., is acquired and held. The gist of every dedication is the absolute surrender to the public use of the dedicated land by the owner, and to this end his acts and declarations must be unmistakable in their purpose, decisive in their character, and clearly indicative of an intention to make an absolute and irrevocable gift. In many respects a dedication by the owner resembles a condemnation by the State in the exercise of the power of

[1] Dedication has been defined as "the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner;" Hunter v. Sandy Hill, 6 Hill (N. Y.) 407.

[2] Todd v. Railroad Co., 19 Ohio St. 514; M. E. Church v. Hoboken, 33 N. J. L. 13.

[3] State v. Tucker, 36 Iowa, 485; M. E. Church v. Hoboken, 33 N. J. L. 13.

[4] As for a training ground or burial place. Nowry v. Providence, 10 R. I. 52.

[5] See 3 Wash. R. P. (4th ed.) 72.

eminent domain. In both instances the ultimate result is the same while the chief differences in the methods of acquisition lie in the facts that in one case the transfer is voluntary and in the other compulsory; that in the former case the land is given as a gratuity, and in the latter that a compensation is awarded for the use. These facts, however, do not materially change the rights of the owner with reference to a subsequent diversion from the specific or general uses for which the land was acquired or affect the right of reversion in case of an abandonment or mis-user. This phase of the subject will receive further mention in connection with other related topics.

Classification.— Dedications are susceptible of several classifications. The first, and most general, is a division into *express* and *implied;* the former being where the act is performed by deed or other writing, vote, overt acts or declarations; the latter rests on a presumption, and results from acquiescence in the public use. A further distinction is made in the United States between *common-law* and *statutory* dedications, and some writers make this the primary classification; but a critical examination will demonstrate that statutory dedication is but one form of express dedication, and differs from a common-law dedication, not so much in the method of performance as in its effects. A third distinction exists between dedications *absolute* and to *specific uses*, and by far the greatest amount of litigation which has attended this branch of the law has originated in questions growing out of this distinction.

How made.— The law requires no particular form or solemnity to constitute a valid dedication, the intention of the owner being the vital principle, and this may be evidenced by his acts or declarations, and the circumstances under which the user has been permitted.[1] So long as the intention of the owner is clearly indicated, the particular method of the manifestation of such intention is immaterial,

[1] Wood v. Hurd, 34 N. J. L. 87; McIntyre v. Storey, 80 Ill. 127; Buchanan v. Curtis, 25 Wis. 99; Shear v. Stothart, 29 La. Ann. 630.

and anything that will equitably estop him from denying such intention is sufficient.[1] Hence, a dedication may be effected by mere acquiescence in the user of land, for public policy has sanctioned a donation for public use without a conveyance or formal grant, and in this respect has made an exception to the rule that all grants must be evidenced by a writing.[2]

A *common-law* dedication is the general name for all donations that are not made in the form prescribed by statute and, as a rule, all appropriations for public use, however made, will be valid as common-law dedications. A *statutory* dedication consists in the making and filing of a plat and the observance of certain formalities in respect to same as prescribed by law. A common-law dedication is generally held to operate by way of *estoppel;* a statutory dedication has the force and effect of a deed, and operates generally by way of *grant.*

At common law, when the right of the public to the use of land rests upon no other foundation than a dedication to public uses, the easement, or right of use, vests in the public, while the fee remains in the original owner, and may be conveyed by him to a third person;[3] but the right of the public to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection.[4]

Under the statute, as now in force in a majority of the states, if the dedication is made in conformity thereto, not only the beneficial enjoyment, but the fee of the land appropriated vests in the public. In such event, where the statutory requisites are complied with, the fee passes as an incident, and the municipality holds the legal title to the same for the public use or purpose intended by the donor.[5]

[1] McIntyre v. Storey, 80 Ill. 127; Huldane v. Coldspring, 21 N. Y. 474.

[2] Warren v. Jacksonville, 15 Ill. 236; Sullivan v. State, 52 Ind. 309.

[3] Williams v. R. R. Co., 16 N. Y. 97.

[4] M. E. Church v. Hoboken, 33 N. J. L. 13; Cincinnati v. White, 6 Pet. (U. S.) 431. Compare Wilson v. Sexton, 27 Iowa, 15.

[5] Manly v. Gibson, 13 Ill. 308; Railroad Co. v. Joliet, 79 Ill. 25.

Control—Diversion.—Where land is dedicated to public use absolutely and without restriction, such use is indefinite, and may vary according to circumstances. The public not being able in themselves to manage it, the care of the land must devolve upon some local authority or body corporate, as its guardian, and where there is no incorporation of the local community the power of directing the uses devolves upon the legislature, as representatives of the whole people.[1] It is the privilege of the dedicator, however, to attach to his donation such reasonable restrictions as he may see fit and the public will take *cum onere*,[2] or, with whatever burden may be imposed. Hence, if land is dedicated for a specific use it cannot be diverted to some other use. In such a case the definite purpose of the donor must be preserved inviolable, or the land will revert to the original proprietor,[3] and whether the dedication be according to the common law or under the statute, a diversion from the declared or necessarily implied use intended by the donor produces the same result.[4]

Offer—Acceptance.—In its essential principles dedication differs from no other form of purchase, and, where lands have been donated to the public, reason and authority alike require, as a protection to the land owner, an acceptance of the same by the constituted representatives of the public or a manifestation of such acts of control and recognition as will furnish a presumption of their acceptance.[5] Until this has been done the dedication does not become obligatory on the donor,[6] and in case of a neglect or a refusal of the public, or the constituted authorities, to accept the dedication, within

[1] R. R. Co. v. Joliet, 79 Ill. 25.

[2] Church v. Portland, 18 Oreg. 73.

[3] Jacksonville v. Ry. Co. 67 Ill. 540.

[4] Thus if land be given to a city for the purposes of a public park or pleasure ground the city would have no right to erect municipal buildings thereon even though for public use.

[5] Summers v. State, 51 Ind. 201; Curtis v. Hoyt, 19 Conn. 154; Sanford v. Meriden, 52 Miss. 383; Denver v. R. R. Co. 17 Colo. 583.

[6] Suspension Bridge Co. v. Bachman, 66 N. Y. 261; Sanford v. Meriden, 52 Miss. 383; People v. Reed, 81 Cal. 70.

a reasonable time, it may be revoked by him and the land again reduced to his possession.[1]

Ordinarily, however, no formal acceptance by the municipal authorities is necessary to constitute or perfect a dedication,[2] and acceptance, may, as a rule, be evidenced by user and express public acts.[3] Thus, in case of a highway, acceptance may be inferred from user and travel and where there has been a user and travel to such an extent and for such length of time as to show that the public convenience and accommodation require the road, this will usually be sufficient for the purpose.[4]

A dedication, therefore, is much in the nature of an offer by the land owner which requires for its consummation an acceptance by the public, either through formal act or general user, and as a necessary corollary it follows that such acceptance must be made in apt time. What would be a reasonable time must depend upon the circumstances of each case.[5]

(c) *Confirmation.*

Nature and operation.— *Confirmation* is that peculiar species of conveyance whereby an estate which was voidable or inchoate is made valid and certain, or where a particular interest is increased. It is not an original method of passing title, and only operates on an estate or right in lands to one who already has the possession of same or some right or interest therein.

Though deeds of confirmation are in use between individuals, the term is more frequently applied to those confirma-

[1] Lockland v. Smiley, 26 Ohio St. 94; Field v. Manchester, 32 Mich. 279; Bridges v. Wyckoff, 67 N. Y. 130; Forbes v. Balenseifer, 74 Ill. 183.

[2] Buchanan v. Curtis, 25 Wis. 99; Osage City v. Larkin, 40 Kan. 206; Kansas City, etc. Co. v. Riley, 133 Mo. 574.

[3] Kemper v. Collins, 97 Mo. 644; Spaulding v. Bradley, 79 Cal. 449.

[4] Wolf v. Brass, 72 Tex. 133; Buchanan v. Curtis, 25 Wis. 99; Spaulding v. Bradley, 79 Cal. 449; Taylor v. St. Louis, 14 Mo. 20.

[5] See People v. Reed, 81 Cal. 70; In this case an acceptance made more than twenty years after the offer of dedication was held to be too late. See also, Field v. Manchester, 32 Mich. 279.

tory acts of government whereby inchoate or uncertain rights derived from the national government or from foreign powers are ratified and approved, and relates to the origin of title. From the earliest period in the history of the country, claims to tracts of land, upon which persons had settled and made improvements in advance of the public surveys, and before the lands had been offered for sale, sometimes upon the express invitation of the public authorities, and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the government. Such claims in great numbers have arisen under other governments from which we have acquired territory, with treaty stipulations for their protection. Sometimes such claims have been submitted to boards of commissioners for approval or rejection; sometimes they have been referred to the judicial tribunals for determination, and sometimes they have been directly acted upon by congress. A confirmation cannot strengthen a void estate, but only one that is voidable, and is conclusive only as between the government and the confirmee.[1]

Confirmation, as a basis of title, relates mainly to imperfect grants of the French, Spanish or Mexican governments, made prior to the annexation of the territory to the United States, and may consist of the judgment or determination of a board of commissioners organized for that purpose, or of the federal courts, or a special act of congress. Though it has been held that a confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands,[2] yet it seems that the legal title to lands, confirmed to a private person by act of congress, or by action of government tribunals, remains in the United States until a patent is issued therefor, and, until then, the confirmee has only an equitable title.[3]

[1] Meader v. Norton, 11 Wall. 442.

[2] Challefoux v. Ducharme, 4 Wis. 554.

[3] Le Bean v. Armitage, 47 Mo. 138; Amesti v. Castro, 49 Cal. 328. In the settlement of these claims the law has generally provided that a patent of the United States should be issued to the claimant when his claim should have been recognized as valid and entitled to confirmation; yet the patent, in

(2) *Title through Act of the Parties by way of Devise.*

Generally considered.—Next to deeds, testamentary conveyances form the most common vehicle for the transfer of interests or estates in land, the instrument for affecting the transfer being called a *will;* the subject-matter as well as the title by which same is acquired, a *devise;* the maker of the will, a *testator;* and the recipient of the testator's bounty, a *devisee.* A will, which is effective as a conveyance only upon the maker's death, is from its own nature ambulatory and revocable during his life, and it is this ambulatory quality which forms the chief characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, of an estate until the death of the disposing party, yet the postponement in such case is produced by express terms and does not result from the nature of the instrument.[1]

Title by devise is of the highest dignity, and effective for all purposes, yet may be defeated in the same manner as a title by descent.

Theory of Devise.—By some writers devise is made the counterpart of inheritance and the title is classed as "testamentary succession." In this view a devisee is regarded as a person nominated by the testator to take his property or succeed to his rights therein, *after* his death. So far as a will may assume to dispose of personalty this view is probably correct, but it must be remembered that our law presents marked differences with respect to its treatment of the two classes of property. Personalty, in the first instance, does not pass to the person indicated to receive it but to the representative of the testator—the executor, by whom it is subsequently given to the legatee provided it has not been needed to discharge the obligations of the deceased. Land, upon the other hand, passes directly from the testator to the

such cases, is only documentary evidence of the existence of the title, or of such equities respecting the claim as to justify recognition and confirmation. Morrow v. Whitney, 5 Otto (U. S.) 551; Langdeau v. Hanes, 21 Wall. (U. S.) 521.

[1] 4 Kent, Com. 520; 2 Black. Com. 502.

devisee and the concensus of opinion of modern scholars is that such devolution is a substantive form of conveyance —a mode of alienation and not of technical succession.

The theory of a testamentary gift of land is, that it is a continuing offer which finally becomes consummate at the moment of the testator's death, and this theory is in strict accord with the law which has always prevailed in this form of devolution of title. Written wills, like written deeds, are comparatively modern, yet testamentary dispositions are very ancient. The primitive form of testamentary gift was simple oral tradition,[1] and was therefore essentially an act of volition by a living person. The nature of the testamentary act has not been changed by the rule which requires the evidence of the gift to be in writing, and the transaction is still a conveyance.

Nature of Testamentary Titles.—One who takes under a will is regarded as a purchaser equally with him who takes under a deed; but the estate and title in the hands of a devisee, while as full and ample as though derived by deed, does not possess that indefeasible character which attaches to it in the latter case. An innocent purchaser by deed takes the title unaffected by latent equities and the undisclosed rights of third persons, but a devisee acquires only the title of the testator as it existed at the time of his death, with all its infirmities and imperfections, and subject to all equities and liens in favor of strangers. Such title, though covering the fee, or whatever interest may have been granted, is liable to be defeated during the course of administration through a sale by the executor in satisfaction of the debts of the decedent;[2] or by the very instrument of its conveyance, when legacies thereby given are expressly charged upon the realty and there exists a deficiency of personal assets;[3] or where the

[1] This form has never wholly ceased to exist but is still preserved in what are known as nuncupative wills of personalty.

[2] Hill v. Treat, 67 Me. 501; Vansyckle v. Richardson, 13 Ill. 171.

[3] Wood v. Sampson, 25 Gratt. (Va.) 845; Lewis v. Darling, 16 How. 1. A devisee who takes an estate under a will assumes the payment of legacies imposed upon him by the terms of the will, and

devise is couched in ambiguous or uncertain language requiring a judicial construction. The two former contingencies can arise only prior to final settlement; the latter at any time before the bar of the statute has intervened.

The titled to lands devised vests in the devisee immediately upon the death of the testator; and such devisee is entitled to the immediate possession of such lands, and to hold the same until, when necessary, they are subjected by the executor to the payment of debts.[1]

Operation and effect of devises.— It is a rule of the common law that a will operates only upon real estate owned by the testator at the time of making the same, and the title to which he retained to the time of his decease. This rule has been very generally changed by statute, which substitutes therefor a more reasonable rule to the effect that every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the estate which he was entitled to devise at the time of his death.[2] It is the application of this rule which gives to the residuary clause much of its present importance. Intention, however, is, after all, the true test of a will; and where the intention is manifest, the will speaks from the time intended by the testator, even though before his death.[3]

Validity of devises.— The several states of the Union possess the power to regulate the tenure of real property within their respective limits, the mode of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, as well as the persons or classes of persons who may take under such disposition.[4] Resort must therefore be had

equity will regard him as a trustee and entertain a bill to compel him to perform his trust. Mahar v. O'Hara, 4 Gilm. (Ill.) 424; Burch v. Burch, 52 Ind. 136.

[1] Hall v. Hall, 47 Ala. 290; Hamilton v. Porter, 63 Pa. St. 332.

[2] Canfield v. Bostwick, 21 Conn. 550; Peters v. Spillman, 18 Ill. 373.

[3] Updike v. Tompkins, 100 Ill. 406; Phillipsburgh v. Burch., 37 N. J. Eq. 482.

[4] United States v. Fox, 94 U. S. (4 Otto), 315; Kerr v. Dougherty, 7 N. Y. 327.

to the statute to determine the validity of all bequests; and where that defines or enumerates the persons or classes who may take, a devise to persons or classes not therein specified will, it seems, be void.[1] Where a devise is void by the rules of law, the land descends to the heirs at law of the testator.[2]

Testamentary capacity.—The right of testamentary disposition is controlled by statute, but is given generally to all persons of full (legal) age, being of sound mind and memory,[3] and extends to all species of property and to every right, title and interest therein. Alienage and coverture formerly constituted a common-law or statutory disability, but a gradual removal of restraints on alienation has virtually or expressly abolished such disability in a majority of the states. Infants and persons of insufficient mind are about the only persons upon whom any restrictions are now placed.[4]

2. *Title through Operation of Law.*

Strictly speaking, all title, whether by purchase or descent, is acquired through operation of law; but for many years courts and writers, in treating of title by purchase, have distinguished between those methods which depend upon the act or agreement of the parties and such as result from other causes or through other agencies. To these latter is applied the general term which forms the heading to this section. This division includes:

(1) All those forms of title accruing through operations of nature, as well as

[1] Thus, by a statute of New York, a devise of lands in that state can only be made to natural persons, and to such corporations as are created under the laws of the state and are authorized to take by devise; a devise, therefore, of lands in that state to the government of the United States was held void. United States v. Fox, 94 U. S. 315.

[2] Deford v. Deford, 36 Md. 168; James v. James, 4 Paige, 115; Hayden v. Stoughton, 5 Pick. 528.

[3] To be of sound and disposing mind, the law simply requires that the testator be able to manage his own affairs, and to know intelligently what disposition he is making of them. Harvey v. Sullen's Heirs, 56 Mo. 372.

[4] This matter is statutory.

(2) Such as result from political and civil relations, or
(3) Grow out of some rule of public policy.

These various forms, as detailed in the succeeding paragraphs, constitute all of the methods of title through operation of law now recognized in the United States.

(1) *Title through Operation of Law resulting from Natural Causes.*

Accretion.—The first and principal method of acquiring title through the operations of nature is termed *accretion*,[1] and is the increase of land caused by gradual and imperceptible additions thereto affected by the washing of the sea, a navigable river, or other stream to which the land is contiguous.[2] The increase or deposit obtained by accretion is technically called *alluvion*, and whether produced by natural or artificial causes inures to the benefit of the adjacent land. Therefore, when land is granted bounded by running water although the contour of the banks may be changed by accretion yet the boundary line of the riparian proprietor will still remain the stream. The reason for this is, that every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.[3] In other words, the addition is regarded as the equivalent for the loss he may sustain by reason of the encroachment of the water upon his land.[4] Hence, the right to alluvial formation is inherent in the land, and constitutes an essential attribute of it, resulting from natural law in consequence of its situation.[5] It is essential, however, that the increase shall be gradual and imperceptible at any one moment of time.[6] Indeed this may be said

[1] From the Latin, *accrescere*, meaning, to grow to.

[2] This was one of the six methods of *accessio* of the civil law.

[3] New Orleans v. United States, 10 Pet. (U. S.) 662. Jefferis v. East Omaha Land Co., 134 U. S. 178.

[4] See, Cox v. Arnold, 129 Mo. 337; Welles v. Bailey, 55 Conn. 292.

[5] St. Clair Co. v. Lovingston, 23 Wall, (U. S.) 46.

[6] Lovingston v. St. Clair Co., 64 Ill. 56; Krant v. Crawford, 18 Iowa, 554; Benson v. Morrow, 61 Mo. 352; Saunders v. R. R. Co. 144 N. Y. 75; St. Louis, etc. Ry. Co. v. Ramsey, 53 Ark. 314.

to be the test of the land owner's right to claim the increase, for when the addition is sudden and perceptible a different rule prevails. The usual incidents of title attend property acquired by accretion.

With respect to rivers not navigable, by common law the owner of the land adjoining is generally presumed to be the owner of the soil to the central line or thread of the stream.[1] This presumption will prevail unless controlled by express words of description, which exclude the bed of the river, and in all cases where the river itself is used as a boundary the law will expound the grant as extending to the center or thread. With respect to navigable lakes and rivers, where the public easement is not interrupted, the question of navigability does not arise, and the riparian proprietor will still be entitled to all accretions without regard to navigability.

In applying the principle that land formed by alluvion is the property of the adjoining owner, it is quite immaterial, on non-navigable streams, whether this alluvion forms at or against the shore so as to cause an extension to the bank, or in the bed of the stream and becomes an island. Where an island is so formed in the bed as to divide the channel and form partly on each side of the thread, the opposite sides belong to the respective proprietors, and the island should be divided according to the original thread. When different owners are interested in shore formations, the increase should be divided according to their respective frontages so as to secure to each the benefits which his original frontage gave him.[2]

[1] Hubbard v. Bell, 54 Ill. 488; Olson v. Merrill, 42 Wis. 203.

[2] For this purpose the following rule may be employed: Measure the whole extent of the ancient line on the river and ascertain how many feet each proprietor owned on the line; divide the newly formed line into equal parts and appropriate to each proprietor as many portions of this new river line as he owned feet on the old. Then, to complete the division, lines are to be drawn from the parts at which the proprietors respectively bounded on the old to the points thus determined as the new points of division on the newly-formed shore. The new lines thus formed will be either parallel, divergent or convergent, according as the

Reliction.—Where land is formed in streams or added to shore lines by the gradual subsidence of waters, the operation is termed *reliction*. The difference between reliction and accretion is but slight, and the effect is the same in either case.[1]

Avulsion.—The sudden removal or deposit of land by the perceptible action of water is called *avulsion*, the operation being the reverse of accretion where the land is formed by slow and imperceptible degrees. In the event of a sudden removal or annexation the title to the soil is not changed, as is the case in accretion, and the original boundaries will remain unaffected by the diversion of the water-course. Thus, if a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new channel, such diversion will work no change of boundary, which remains as it was in the centre of the old channel, although no water may be flowing therein.[2]

It will therefore be seen that in questions growing out of riparian ownership, accretion, no matter to which side it adds ground, leaves the boundary still the centre of the actual channel;[3] avulsion, on the other hand, has no effect on boundary, but leaves it in the centre of the old channel.[4]

The term "avulsion" is also applied to the derelict left by the sudden subsidence of water on the sea shore or on navigable rivers. With respect to rights of ownership in such lands the authorities are not altogether harmonious, but the

new shore line of the river equals, exceeds, or falls short of the old. This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river or the accretion. See Deerfield v. Arms, 17 Pick. (Mass.) 41; Batchelder v. Keniston, 51 N. H. 496.

[1] Warren v. Chambers, 25 Ark. 120; Boorman v. Sunnuchs, 42 Wis. 235.

[2] 2 Black. Com. 262; Ang. Water Courses, § 60; Trustees v. Dickinson, 9 Cush. (Mass.) 544; Buttenuth v. Bridge Co., 123 Ill. 535; St. Louis v. Rutz, 138 U. S. 226.

[3] Cox v. Arnold, 129 Mo. 337.

[4] Nebraska v. Iowa, 143 U. S. 359. In this case it was held that the proposition applied with the same force in controversies between states and nations as when the boundaries of private property is in dispute.

majority, following the common law, place the title to such derelict in the sovereign.[1] In the case of inland navigable streams the title depends upon local laws, some states claiming title to the bed of the stream, while others concede it to the riparian proprietor, subject only to the public rights of navigation.

(2) *Title through Operation of Law resulting from Political and Civil Relations.*

Eminent Domain.—The sovereign right of the state to appropriate or subject to public uses the private property of the citizen without his consent, is called *eminent domain.* Whatever exists, in any form, whether tangible or intangible, is subject to the exercise of this right, including the property and franchises of corporations as well as of individuals.[2] The right is inherent in the state as an attribute of sovereignty, and may be exercised without limit or restriction, either for itself or in favor of individuals or corporations engaged in undertakings of a public nature.[3] When from motives of public policy such right is lodged in a corporation, it will be strictly limited by the uses for the furtherance of which it was conferred. In every event, however, the exercise of the right of eminent domain is primarily the act of the state, and corporations to whom it has been delegated, and by whom it is immediately asserted, are but agencies or instrumentalities of the state, notwithstanding they may have and generally do have corporate interests intermingled with and growing out of the same.[4]

While the power of eminent domain can only be exercised for a public use, yet it never has been deemed essential that the entire community, or any considerable portion, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. It is

[1] Dikes v. Miller, 24 Tex. 417. See 2 Black. Com. 262.

[2] Rigney v. Chicago, 102 Ill. 64; United States v. Jones, 109 U. S. 513.

[3] Boom Co. v. Patterson, 98 U. S. 403.

[4] Hatch v. Railroad Co., 18 Ohio St., 92.

enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns, and the creation of new channels for the employment of private capital and labor, such results contributing indirectly to the general welfare and prosperity of the whole community.[1]

The proceeding by which a person may be divested of his property without his consent, in pursuance of the right of eminent domain, is technically termed a *condemnation*.

But with the right of condemnation of lands, or any estate or interest therein, there is a concurrent obligation to make just and full compensation therefor,[2] and such compensation is always a condition precedent to the appropriation of the property.[3] So, too, when land has been acquired by the public for a particular use, no additional burden can, as a rule, be superadded without further compensation.[4] These, however, are constitutional limitations of the right.

How Exercised.— As to what constitutes a "taking," under the law which provides that no property shall be "taken" without compensation, is not altogether clear. Primarily property may be said to be taken when there is an actual physical appropriation; a divesture of title to a specific and definite tract and an ouster of the possession thereof. Yet it does not seem to be necessary that property should be literally "taken" in order to bring it within the constitutional provision requiring compensation. There may be such a serious interruption to the common and necessary use of property as will virtually amount to a taking although not in fact actually appropriated. Thus, the flowing of lands against the owner's consent is, in legal effect, a taking, and

[1] Talbot v. Hudson, 82 Mass. 417; In re Gas Co., 63 Barb. (N. Y.) 437.

[2] Johnson v. Railroad Co., 23 Ill. 202.

[3] Cameron v. Supervisors, 47 Miss. 264; Paris v. Mason, 37 Tex. 447; Cook v. Commissioners, 61 Ill. 115.

[4] State v. Leverack, 34 N. J. L. 201.

violates that clause of the constitution which prohibits the taking of private property without compensation.[1]

In many states the constitutional provision relating to indemnity is for property "taken or damaged." This change in the organic law has had the effect to declare a new rule of civil conduct from which spring new rights that did not exist while the inhibition was aimed only at express invasion or appropriation. Hence it has been held, that when property is injuriously affected by establishing the grade of a street, or by raising or lowering a street grade previously established, it is damaged for public use within the meaning of the constitution.[2]

With respect to what property may be taken it may be said that, generally speaking, there is no such thing as a limitation or extinction of the right of eminent domain. It extends to all classes of property—corporeal and incorporeal—and includes as well that which is held under it as that which is not.[3]

The estate acquired.—The exercise of the right of eminent domain is regulated in the United States by express statute, and it is a cardinal rule that every statute in derogation of the right of property, or that takes away the estate of the citizen, is to be construed strictly; and no implication can be indulged in that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statue making, or providing for, the appropriation. Hence, the general rule is that the exercise of the power of eminent domain, particularly when exerted in behalf of corporations, extends only to the use of the property appropriated and does not include the fee.[4] In such event, should the use be abandoned, the land, disincumbered of the

[1] See, Arimond v. Green Bay, etc., Co., 31 Wis. 316; Grand Rapids, etc., Co. v. Jarvis, 30 Mich. 308.

[2] Werth v. Springfield, 78 Mo. 107; Rigney v. Chicago, 102 Ill. 64.

[3] As where one railroad company, locating its right of way, by condemnation crosses the right of way of another railroad company. See, Plank Road Co. v. R. R. Co., 13 Ind. 90; Mason v. Bridge Co., 17 W. Va. 396.

[4] Railroad Co. v. Burkett, 42 Ala. 83; Morris v. Turnpike Road, 6 Bush (Ky.) 671.

easement imposed by the appropriation, will revert to the owner of the fee. The easement, however, is usually regarded as perpetual, and as such forms the basis of compensation.

While this may be taken as the general rule, it is yet subject to modification and exception. It has been held that it is not necessary that exact or technical language should be used in a statute providing for the taking of private property for public use in order to vest the fee in the public; but in such case it must clearly appear that it was the intention of the legislature, as disclosed by the act itself, to take a fee. If any remaining ownership is inconsistent with the use for which the land is taken, and compensation is made for the fee, which is also necessary for the full use of the property, a fee will be deemed to have been taken in the absence of express words.[1] Indeed, in some of the states the fee passes as an incident,[2] and excludes any remaining rights in the former owner; but usually the extent of interest, or quantity and duration of the estate acquired by the exercise of this power, is derived from the specific act of appropriation. The power is a legislative one, subject only to constitutional restrictions, and the only conditions requisite to its exercise are the needs of the public and compensation to the owner; when these conditions exist, the right of the state to withdraw the property from private control and subject to public use whatever interest or estate is necessary to accomplish the intended purpose is complete, and this interest, according as the legislature may determine, may consist of an estate for years, for life, a mere easement, a conditional fee, or a fee-simple absolute.[3]

Diversion — Reverter. — As before remarked there are many points of resemblance between a dedication of land by the owner and a condemnation by the state. The fact that

[1] Park Commissioners v. Armstrong, 45 N. Y. 234.

[2] Troy v. Railroad Co., 42 Vt. 265; Challis v. Railroad Co., 16 Kan. 117.

[3] Consult Cooley's Const. Lim. See, also, 2 Kent, Com., lec. XXXIV; 2 Dill. Mun. Corp. § 583 et seq.

in the case of condemnation a compensation is made for the use to which the land is subjected does not materially change the rights of the owner with reference to a subsequent diversion from the uses for which the land was originally acquired. As a general rule, where land is condemned for a special purpose on the score of public utility, the sequestration is limited to that particular use,[1] and the specific purpose must be observed or the land must revert to the original proprietor.

The rule that land taken by the public for a certain use cannot be appropriated to another and different use, to the detriment of the owner, affords the only adequate protection of the citizens' constitutional right to be compensated for the condemnation of his property for the public benefit,[2] and no additional burden can be imposed upon the land so taken without additional compensation.[3]

Escheat.— When the owner of land dies intestate and leaving no heirs, the title to his property vests in the state by an operation of law known as *escheat.*[4]

In its original acceptation escheat was the right of the lord of the fee to enter same when it became vacant by extinction of the blood of the tenant. That is, where a feoffment had been made to a man and his heirs the estate continued as long as there were heirs of the first purchaser. When the person last seized died with no person surviving him related to him by blood, as there could be no inheritance the land again became the absolute property of the superior lord, from whom, or from whose ancestor, it was originally derived. At common law an escheat might also arise where the tenant was attainted of treason or felony, by which he

[1] Imlay v. R. R. Co. 26 Conn. 255; State v. Laverack, 34 N. J. L. 201.

[2] O'Neal v. City of Sherman, 77 Tex. 182.

[3] State v. Laverack, 34 N. J. L. 201. This principle has given rise to much litigation in the determination of the question, what are additional uses? See, Kellinger v. R. R. Co. 50 N. Y. 206; Hiss v. R. R. Co. 52 Md. 242; Moses v. R. R. Co. 21 Ill. 516. Telegraph Co. v. Barnet, 107 Ill. 507.

[4] The origin of the word is obscure, said to be from the French, *eschier.*

became incapable of inheriting anything from his relations or of transmitting anything by heirship. An escheat, therefore, was in fact a species of reversion, and is so called and treated by the early writers. When alienation was introduced the substitution of a new tenant changed the chance of escheat but did not destroy it; and when a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary[1] succession, the lord taking as an ultimate heir.[2] The principle of this latter characteristic has been retained in the American theory of escheat.

It will thus be seen that escheat was one of the incidents of feudal tenures, and is still occasionally mentioned as marking the feudal origin of American land titles. Nothing but the name, however, is feudal, and it is only another instance in which, in our land system, a word is applied in a sense far different from its original meaning. In the United States, escheat, together with all of its incidents, depends upon positive statutes. It does not follow as a matter of right, but of expediency. The lord of the fee holding the ultimate title might, with propriety, assert his ownership, but no such right can be claimed by the state; nor is the idea compatible with the full property in land held under an allodial title.[3] It is, however, a rule of civilized society that when the deceased owner has left no heirs, his property shall vest in the public, and be at the disposal of the government, and, by the general rule of the common law, all real property capable of use and possession, and having no other acknowledged owner, is in theory vested in the king as the head and sov-

[1] *Caducum*, a windfall; a casual profit which happens to the lord by chance, and unlooked for.

[2] See Cruise Dig. Tit. XXX, s. 7.

[3] This view is contrary to that held by the earlier American writers, who, reasoning by analogy, maintained that the state succeeded to the place of the feudal lord, and, by virtue of its sovereignty, became the original and ultimate proprietor of all the lands within its jurisdiction. (See 4 Kent Com. 424.) The vice of this reasoning may be seen in the fact that the original proprietor of all lands west of the Alleghanies was the United States, and not the state, and yet the state and not the Federal Government will take by escheat.

ereign representative of the nation; so the state, in its right of sovereignty, may be said to possess, in a restricted sense, the ultimate property of all lands within its jurisdiction.

But while the title to lands of an intestate without heirs vests immediately in the state by operation of law, yet, as a rule, some action is necessary on the part of the state to assert the title thus acquired, which is accomplished by a procedure usually termed "inquest of office."

The state, on acquiring lands by escheat, takes the same title as the person last seized, charged with the same trusts, liens and incumbrances to which the property would have been subject had it descended to heirs, the state being for this purpose a statutory heir in default of known kindred.[1]

Confiscation.—Closely allied to escheat, but resting on a different foundation, is the method of acquisition known as *confiscation*, being the right to appropriate to the use of the state the property of alien enemies during war. Respecting this power of the government no doubt can be entertained, for it is a cardinal rule, of universal observance, that war gives to the sovereign full right to take the persons and property of the enemy wherever found. The mitigation of this rigorous rule, which the wise and humane policy of modern times has introduced, may to some extent affect the exercise of this right but cannot impair the right itself.[2]

Except in a few instances during the Revolutionary period[3] this right seems to have been restricted to seizure of personal property until the late civil war, when, by act of congress,[4] the right of confiscation of real estate was again

[1] It will be seen from the statements of the text that escheat is practically a form of descent, and, were it not for the reluctance of courts and writers to disturb the classification which has so long prevailed, would properly fall under that head.

[2] Brown v. United States, 8 Cranch (U. S.) 110.

[3] It would seem that a number of colonial governments employed this rigorous measure against those who continued to adhere to the crown, upon the principle that such persons were conspirators against the state. This course was followed in Massachusetts, Maryland, New York, Georgia, and probably other of the colonies.

[4] Act of July 17, 1862.

asserted. But concurrently with the passage of this act congress also adopted a joint resolution explanatory of the same, whereby it resolved that no punishment or proceedings under the act should be construed so as to work a forfeiture of the real estate of the offender beyond his natural life; and courts, when passing upon the question, have uniformly decided that confiscation proceedings, in effect, reach only the life estate of the owner.[1] The condemnation goes to the whole estate, however, and extinguishes all the rights possessed by the original owner, leaving in him no estate or interest of any description which he can convey by deed, and no power which he can exercise in favor of another. The forfeiture, therefore, is complete as long as it lasts, and the *proviso*, by way of grace, gives back the land to the heirs of the original owner upon his death.[2]

Forfeiture.— The term *forfeiture*, when employed to designate a method of acquiring title, has several distinct meanings. In its primary signification it is the means whereby the property of the citizen inures to the state by reason of the violation of law or neglect of legal duty. In the United States this occurs only in case of attainder of treason or non-payment of taxes.[3] In either case it is in the nature of a penalty, and results as an incident of our reciprocal duties and obligations. In England attainder of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted to the disinherison of his heirs. When the federal constitution was framed, this was felt to be a great hardship, if not a positive injustice, and, for this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture of estate, except during the life of the person attainted.[4]

[1] Biglow v. Forrest, 9 Wall. (U. S.) 339; Day v. Micou, 18 Wall. (U. S.) 156; Dewey v. McLain, 7 Kan. 126.

[2] Wallach v. Van Riswick, 2 Otto (U. S.), 202; French v. Wade, 12 Otto (U. S.), 132; Pike v. Wassell, 94 U. S. 711.

[3] At common law the offenses which induced a forfeiture to the crown were: (1) treason; (2) felony; (3) misprision of treason; (4) premunire; (5) contempt of court; (6) popish recusancy.

[4] The same rule now prevails in England.

A forfeiture for non-payment of taxes is based upon the principle that every owner of lands holds his estate upon the implied condition that he will promptly pay his share of the common burdens assessed against the entire community, and if he fails to comply with this condition, and his estate is offered at public sale for such delinquency, and no purchaser can be found for it, the title is transferred from the owner to to the state, the latter being always ready to bid for the land when no other bidder appears.[1] The term "forfeiture" may not always be used in this connection, but the effect, in every instance where the property passes to the state in default of purchasers, is a forfeiture. Such forfeiture operates to divest the title of the original owner, though ample time is generally allowed for redemption, and purchasers of forfeited lands where the law has been strictly complied with, will acquire a valid title from the state.

So, too, the sale of lands for non-payment of taxes is, in a proper sense, an exercise of the right of forfeiture.

The secondary signification of the term is where an interest or estate in lands reverts to a former owner, by operation of law, on breach of a condition annexed to the grant thereof. Forfeitures of this kind are not favored in law, and courts eagerly seize hold of any circumstances by which same may be defeated; and where adequate compensation can be made, the law in many cases, and equity in all cases, will discharge the forfeiture upon such compensation being made. Where lands revert in this manner they are held by virtue of the grantor's former title. The forfeiture is simply an incident.

Tax titles.—The last species of title resulting from political and civil relations is that which is raised for the benefit of a purchaser at tax sale and which is generally known as *tax title.*[2] It is a fundamental proposition that all property of the citizen is subject to a just proportion of the burdens of taxation in return for the protection which the state affords.

[1] See Blackw. Tax Tit. *460; Clery v. Hinman, 11 Ill. 430.

[2] Mr. Washburn classifies this form as title by *office grant.* 3 Wash. Real Prop. 209.

A tax, when assessed, is in one sense a personal debt, and may be collected by any of the legal methods provided by law; yet it is not an ordinary debt, for it takes precedence of all other demands, and is a charge upon the property assessed without reference to the matter of ownership. In case of the non-payment of the debt, the state, in the exercise of the perpetual lien which by virtue of its sovereignty it possesses upon all taxable lands within its limits, may seize and sell the land charged with the tax, although there may be prior liens and incumbrances upon it, and thus enforce payment to the exclusion of all other creditors.

In theory there is nothing offensive in the sale of land for taxes, harsh as it may sometimes appear. In practice, as the procedure exists in some states, it is little short of legalized piracy. Particularly is this true with respect to the rights of incumbrancers and record creditors.

The title raised by such a sale is a purely technical as distinquished from a meritorious title, and depends for its validity upon a strict compliance with all the requirements of law.[1]

A tax title, though bearing some resemblance to titles derived under judicial and execution sales, differs in this: that the latter are strictly derivative titles, and dependent not only on the legality of the procedure of transfer, but upon the acts of former owners. A tax title on the contrary, from its very nature has nothing to do with the previous chain of title, nor does it in any way connect itself with it. The person asserting it need go no further than his tax deed, and the former title can neither assist nor prejudice him. The sale operates upon the land and not upon the title; and it matters not how many different interests may have been connected with the title, if it has been regularly sold, the property, accompanied by the legal title, goes to the purchaser. No covenants running with the land, or other inci-

[1] Altes v. Hinckler, 38 Ill. 265; see, Childers v. Schautz, 120 Mo. Hewes v. Reis, 40 Cal. 225; and 305.

dent to the title, as a title, passes to the purchaser, but he takes the land by a new, independent and paramount grant.[1]

(3) *Title through Operation of Law resulting from Public Policy.*

Estoppel.—Nearly all of the elementary writers, when treating of the subject of real property, mention, among other methods of purchase, the acquisition of title by *estoppel.* Strictly speaking, however, this is not a method of acquiring title at all, but simply a recognition of an existing title. The principle of estoppel is that, in order to accomplish the purposes of justice which cannot otherwise be reached, the law will draw certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it will not allow the former to controvert or deny. In other words, he will be *estopped* from asserting anything in derrogation of his former acts or statements. Thus, if A, having no title to lands, yet conveys same by deed to B, reciting in his deed, either expressly or by necessary implication, that he is the owner of the land and has good right to convey same, and afterwards acquires title thereto, he will be estopped to assert such after acquired title against his grantee, by reason of his former deed.[2]

It will be seen, therefore, that a title is rather presumed than acquired by estoppel, by precluding parties, by reason of their former acts, from asserting anything to the detriment of such title. At the same time it must be remembered

[1] See Chicago v. Larned, 34 Ill. 279; Bank v. Billings, 4 Pet. (U. S.) 561; Beaty v. Mason, 30 Md. 409; Wofford v. McKinna, 23 Tex. 43; Harding v. Tibbils, 15 Wis. 232, for a discussion of the principles stated in the text. Consult, also, Blackwell on Tax Titles, *passim.*

[2] Reynolds v. Cook, 83 Va. 817; Batchelder v. Lovely, 69 Me. 33; Magrauder v. Esway, 35 Ohio St. 221. The general rule is that when land is conveyed without warranty the grantor is not estopped from setting up an after-acquired title, but estoppel may arise on other grounds, as stated in the text, and this principle has been recognized and declared in many states by statutory enactment. Consult local statutes. See, also, Pike v. Galvin, 29 Me.

that estoppels are not favored in law, for the object of the administration of justice is to discover and apply the truth; yet there are cases in which courts are bound to say to a litigant that he has, to his own advantage or to the injury of his adversary, asserted that which is false, and that, having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter.[1]

Classification.—Estoppels are classified, according to their nature, as *technical*, or by record or deed, and *equitable*, or *in pais*. Courts at the present day incline to restrict the doctrine of technical estoppel and to favor an equitable estoppel. Mutuality is an essential ingredient of estoppels; and it follows from the very principle on which the whole doctrine rests that they can operate neither in favor of nor against strangers, but affect only the parties and their privies in blood, law or estate. A third party derives no advantage from, nor can he be bound by, an estoppel, and this rule applies equally whether the estoppel arises by record, deed, or matter *in pais*.[2]

Estoppel by record is based upon the rulings and determinations of the courts, and proceedings had therein. The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matters.[3] The reversal of a judgment destroys its efficacy as an estoppel.[4]

Estoppel by deed arises from the provisions contained in conveyances of land, either by recital, admission, covenant or otherwise, whether in express terms or by necessary implication, and parties giving and receiving same, together with their privies, are estopped from denying the operation of the deed according to manifest intent.[5] In controversies

[1] Sinclair v. Jackson, 8 Cow. (N. Y.) 586; Douglas v. Scott, 5 Ohio, 199; Ham v. Ham, 14 Me. 351.

[2] Chope v. Lorman, 20 Mich. 327; Simpson v. Pearson, 31 Ind. 1; McDonald v. Gregory, 41 Iowa, 513.

[3] Lewis' Appeal, 67 Pa. St. 153; Dixon v. Merritt, 21 Minn. 196.

[4] Smith v. Frankfield, 77 N. Y. 414.

[5] Tobey v. Taunton 119 Mass. 404; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Foster v. Young, 35 Iowa, 27.

concerning the title to real estate, the question of estoppel most frequently arises in construing covenants; and it is a general rule that where a person conveys land with a general warranty, he having no title at the time, but afterwards acquires title to the same, such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question.[1]

Estoppel in pais arises from acts, conduct, or declarations, by which one person designedly induces another to alter his position injuriously to himself, and rests upon the principle that a party has misled another to his prejudice, under such circumstances that it would be a fraud for him to assert what may be the truth. Hence, to raise an estoppel from former declarations or admissions by a party to prevent him from setting up his title to property, the facts must show: (1) That when making the statements or admissions relied upon he was apprised of the true state of his own title; (2) that he made the statement or admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; (3) that the other party had neither knowledge of the true state of the title nor convenient means of acquiring such knowledge by the use of ordinary diligence; (4) that he relied directly upon such statement or admission and will be injured by allowing its truth to be disproved.[2] Thus, A being about to purchase a lot, which adjoined B's land and was bounded by it, and not knowing the boundary line, applied to B to point it out. B, knowing that the inquiry was made with a view to purchasing the property, did so. A, having purchased the land, relying on the statement of B, it was held that the latter was estopped to deny that the line thus pointed out by him was the true one.[3]

[1] Burtners v. Keran, 24 Gratt. (Va.) 43; Wiesner v. Zaun, 39 Wis. 188; Pike v. Galvin, 29 Me. 183.

[2] Martin v. Zellerbach, 38 Cal. 300; McCabe v. Raney, 32 Ind. 309; Halloran v. Whitcomb, 43 Vt. 306; Horn v. Cole, 51 N. H. 287.

[3] Spiller v. Scribner, 36 Vt. 247.

It will thus be seen that the important and primary ground of estoppel *in pais* is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted; but no one can set up another's act or declaration as the ground of an estoppel, unless he has himself been deceived by it,[1] and a party never can be estopped by an act that is illegal and void.[2]

An estoppel *in pais*, unlike that by deed, operates only on existing rights, and does not preclude the assertion of a title subsequently acquired from a third person.[3]

As just stated, estoppel arises from conduct as well as acts, therefore mere inaction — silence — may be as effective as spoken words. Thus, if the owner of land knowingly suffers others to purchase same and to expend money upon it, under the belief that they have acquired a valid title, without objection or without making known his own claim, he thereby becomes estopped from asserting any right or title as against such purchasers.[4] But this rule must be taken with the qualification that mere silence will not create an estoppel unless there was a duty to speak,[5] nor unless there was a knowledge of the existing facts and rights.[6]

At law the doctrine of equitable estoppel cannot be applied to work a transfer of property, which, by the statute of frauds, can be effected only by a writing, and a legal title must always prevail; yet, although a party cannot divest himself of such an estate by parol, he may, without writing, so conduct himself with reference to it that he will be estopped afterward to assert a claim thereto; and this principle is applied without reference to the statute of frauds.[7]

[1] Simpson v. Pearson, 31 Ind. 1; McKinzie v. Steele, 18 Ohio St. 38; Devries v. Haywood, 64 N. C. 83.

[2] Mattox v. Hightshue, 39 Ind. 95.

[3] McLain v. Buliner, 49 Ark. 218.

[4] Forbes v. McCoy, 24 Neb. 702; Powers v. New Haven, 120 Ind. 185; Gil v. Hardin, 48 Ark. 409; Stone v. Tyree, 30 W. Va. 687.

[5] Rubber Co. v. Rothery, 107 N. Y. 310.

[6] Van Horn v. Overman, 75 Iowa 421; Bartlett v. Kauder, 97 Mo. 356.

[7] Railroad Co. v. Ragsdale, 54 Miss. 200; Kelly v. Hendricks, 57 Ala. 193; Hayes v. Livingston, 34 Mich. 384.

Does not affect State.—The doctrine of estoppel does not ordinarily apply to the state as it does to individuals. The sovereign power is but a trustee for the people. It acts by its agents, and the people should not be bound by any statement of facts made by those agents. For their benefit the truth may always be shown, notwithstanding any former statement to the contrary.[1] This principle rests, in part, at least, upon the general doctrine that the state cannot part with its title to land except by grant or other record evidence. An apparent exception has been said to arise in those cases in which the act sought to be made binding was done in its sovereign capacity by legislative enactment or resolution; but this is not so much an exception to the general doctrine of estoppel by acquiescence in an authorized act of a mere subordinate agent, as it is an original binding affirmative act on the part of the state itself, made in the most solemn manner in which it can give expression to the sovereign will.

Prescription.—By the law of nature, observes an old writer,[2] occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself, and to everything annexed to or issuing out of it. Hence, possession was the first act from which the right of property was derived; it has therefore become an established rule of law, in every civilized country, that a long and continued possession will confer title to real property. This mode of acquisition is known as *prescription*. Yet, like the subject considered in the preceding paragraph, prescription is not, in the proper sense of the term, an acquisition, but rather a recognition of title, and is founded upon the presumption that the party in possession of lands would not have been permitted by other claimants to hold and enjoy same without a just and paramount right. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and

[1] Fannin Co. v. Riddle, 51 Tex. 360; Farish v. Coon, 40 Cal. 50; Johnson v. United States, 5 Mason (Cir. Ct.) 425.

[2] Cruise; Dig., tit. XXXI, § 1.

uninterrupted possessions. They are founded upon the consideration that the facts are such as could not occur, according to the ordinary course of human affairs, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.[1]

Prescription, in the original and ancient meaning of the word, rests upon the supposition of a grant, and the use or possession on which such title is founded must be of such a nature as to indicate that it is claimed as of right, and not the effect of indulgence, or of any compact short of a grant. Such use and possession must further have continued for a time "whereof the memory of man runneth not to the contrary."[2]

These doctrines are quite ancient and grew out of the early practice of the English courts. It would seem that where a right was claimed by usage alone it must have been enjoyed for a period beyond the memory of man, which, for a long time, went back to the reign of Richard I.[3] But to obviate the necessity of such an impossible proof it became customary to rely upon the presumption of a deed having been given and of its having been lost, after showing an uninterrupted enjoyment for a sufficient length of time. This time has been variously fixed. Until a comparatively late day sixty years was required; subsequently forty years was considered a sufficient length of time to establish a prescriptive title; but in the United States it is the policy of courts to limit the presumption of grants to periods analogous to those of the

[1] Gayetty v. Bethune, 14 Mass. 49; Ingraham v. Hutchinson, 2 Conn. 584; Emmons v. Turnbull, 2 Johns. (N. Y.) 322.

[2] See Coolidge v. Learned, 8 Pick. (Mass.) 508.

[3] It does not seem that acquisitive prescription for land was employed in the early English law but merely a limitation of actions. Before 1237 claimants had been allowed to go back to a seizin on the day in 1135 when Henry I died; then they were restricted to the day in 1154 when Henry II was crowned; in 1275 the boundary was moved forward to the coronation of Richard I in 1189 and there it remained during the rest of the middle ages. Pollock v. Mait. Hist. Eng. Law, Vol. 2 p. 81.

statute of limitations, in cases where the statute itself does not apply.[1]

In its early and technical signification, prescription applied only to incorporeal hereditaments, or such property as lies in grant; but as all kinds of property now lie in grant, the distinction, under the land system of the United States, is practically of little or no force or effect.[2] Nor is the rule of immemorial usage now much resorted to, except in connection with statutes limiting the time for entry upon land. But as the statutes of limitation have reference more to land, or to those forms of real property into which an entry can be made, immemorial user may still be resorted to for the purpose of establishing prescriptive rights in easements and property of a like nature. Thus, a right to flow land, to maintain a watercourse, to cross a field, etc., may be established by prescription.

Limitation.—Closely resembling the general features and partaking of the same nature as prescription is that form of title asserted under and by virtue of statutory enactments prohibiting the maintenance of actions for the recovery of real property after the lapse of a certain number of years, and known as *limitation*. While the terms "prescription" and "limitation" are often used interchangeably, and while the reason for the statute of limitations must undoubtedly be sought in the general doctrines of prescription, yet the statute, unlike immemorial usage, does not rest on any presumption, but is a positive rule of law established for the quieting and repose of titles.[3] In the United States the

[1] Hunt v. Hunt, 3 Met. (Mass.) 175; Watkins v. Peck, 13 N. H. 360; Shumway v. Simons, 1 Vt. 53; Okeson v. Patterson, 29 Pa. St. 22.

[2] Blackstone asserts that a prescriptive title cannot be acquired with respect to corporeal hereditaments. The earlier writers, Littleton, Coke, etc., do not say so, however, and Mr. Cruise, writing in the earlier part of the nineteenth century devotes an entire chapter to prescriptive ownership of land. The doctrine of the modern writers seems to be that title by length of time and continuous enjoyment applies as well to land as to rights annexed to land.

[3] See 3 Kent, Com. 442; 2 Greenl. Ev. § 539.

period of limitation with respect to real actions, or rights of entry upon lands, has been quite uniformly fixed at twenty years after the cause of action or right of entry shall have accrued; and where lands have been adversely held and enjoyed for this period, a valid and substantial title is raised by limitation.

To support this title, however, the original entry must have been made under *color* or *claim* of title, while the possession, to be *adverse*, must be so open, visible and notorious as to impart notice to all persons interested that a claim of right is intended thereby. To furnish the basis of a substantial title such possession must not only be hostile and inconsistent with the claim of others, but the claim of right which accompanies same must not have originated in fraud; and to perfect such title the possession must extend in unbroken continuity over the entire period prescribed by the statute.[1]

But while continuity of possession is an essential ingredient of a title by limitation, yet it is not necessary that the same person should have occupied the land during the entire statutory period. Several persons may occupy successively, provided there is privity between them, and each successive occupant may unite or add the time of his predecessors to his own. This is technically known as *tacking*.[2]

Requisites of Adverse Possession.—A clandestine entry will never serve to set the statute in motion; for in order to bar the true owner he must have actual or constructive notice of the claim, and the entry must be made and possession continued under such circumstances as to enable such true owner, by the exercise of reasonable diligence, to ascertain the fact of entry and the right and claim of the party making it.[3] So, too, permissive user can never, by any

[1] Carroll v. Gillien, 33 Ga. 539; Beatty v. Mason, 30 Md. 409; Dixon v. Cook, 47 Miss. 220; Bowman v. Lee, 48 Mo. 335; Cahill v. Palmer, 45 N. Y. 484; Evans v. Templeton, 69 Tex. 375; Downing v. Mayes, 153 Ill. 330; Colvin v. Land Co. 23 Neb. 75.

[2] See Filson v. Simshauser, 130 Ill. 649.

[3] Fugate v. Pierce, 49 Mo. 441; Soule v. Barlow, 49 Vt. 329; Illinois, etc., R. R. Co. v. Houghton, 120 Ill. 233.

lapse of time, ripen into a title, when the original entry was by consent of the owner and no adverse claim of ownership has been asserted.[1] Nor can a mere trespass ever ripen into a right, no matter how long continued;[2] nor will occupation by mistake or ignorance suffice to constitute an adverse holding.[3] In every case, to bar the assertion of the legal title, the possession must be hostile, and under a claim of exclusive right.[4]

As previously stated, the adverse entry must be made under *color* or *claim* of title. *Color of title* generally imports documentary evidence of some kind, so far valid in appearance as to be consistent with the idea of good faith, and purporting on its face to convey title.[5] A *claim of title* may exist wholly by parol.[6] Possession under a claim of title, without a conveyance by deed or other written instrument, limits the person so asserting his claim to his actual inclosure or occupancy;[7] but when founded upon color, as well as claim, of title, a constructive possession of the entire tract claimed will follow the actual occupancy of any portion, provided the deed, or other matter constituting the "color," be of record.[8] In either case, when the entry is followed by a continuous and uninterrupted possession for the entire statutory period, it will constitute an adverse holding, effective for all purposes, however groundless the supposed claim of title may be.[9]

Exceptions to the Rule.— Persons under disability are specially excepted from the operation of this statute, and

[1] Railroad Co. v. Ross, 47 Ind. 25; Bedell v. Shaw, 59 N. Y. 46; Smith v. Hitchcock, 38 Neb. 104.

[2] Thompson v. Pioche, 44 Cal. 508; Nowlin v. Reynolds, 25 Gratt. (Va.) 137.

[3] Thomas v. Babb, 45 Mo. 384; Farish v. Coon, 40 Cal. 33.

[4] Gay v. Mitchell, 35 Ga. 139; Smeberg v. Cunningham, 96 Mich. 378.

[5] Baker v. Swan, 32 Md. 355; Kruse v. Wilson, 79 Ill. 240.

[6] Hamilton v. Wright, 30 Iowa, 486.

[7] Dills v. Hubbard, 21 Ill. 328; DeGraw v. Taylor, 37 Mo. 311; Pharis v. Jones, 122 Mo. 125.

[8] Brooks v Bruyn, 18 Ill. 539; Tritt v. Roberts, 64 Ga. 156.

[9] Ford v. Wilson, 35 Miss. 504; Grant v. Fowler, 39 N. H. 104; Campau v. Lafferty, 43 Mich. 431.

their rights in land are not only protected during the period of disability but for a certain time after it has ceased. This class generally includes infants, insane persons, and persons imprisoned on a criminal charge for any period less than life.[1] Nor will the statute generally be permitted to run against a remainder-man until the termination of the precedent estate,[2] while as against reversioners there can be no adverse possession. It can only exist against one entitled to possession; that is, against one whose right of entry has accrued.[3] So too, as a general rule, the statute of limitations does not run as between tenants in common, for the reason, in part at least, that the possession of one, in contemplation of law, is the possession of all.[4]

Does not Affect the State.—Neither will the statute run against the state. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, founded on the principle of public policy, that, as he was occupied with the cares of government, he ought not to suffer from the negligence of his officers or servants. This principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public.[5] It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are held not to embrace the state itself,[6] unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. So, too, as the legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are necessarily excluded from the operation of such statutes.[7] As adverse possession cannot run

[1] Married women are sometimes included in this exception.

[2] Christie v. Gage, 71 N. Y. 189; Dugan v. Follett, 100 Ill. 581.

[3] Gernet v. Lynn, 31 Pa. St. 94; Raymond v. Halder, 2 Cush. (Mass.) 269.

[4] Florence v. Hopkins, 46 N. Y. 182; McQuiddy v. Ware, 67 Mo. 74.

[5] Gibson v. Chouteau, 13 Wall. (U. S.) 92.

[6] Gardiner v. Miller, 47 Cal. 570.

[7] United States v. Hoar, 2 Mason, 312.

against the government, it logically follows that the claim cannot be asserted against a grantee of the government where the adverse entry is made prior to the government's conveyance.

Effect of Limitation.—Generally, when title to land has been matured by twenty years adverse possession and enjoyment, it becomes equally as strong as one obtained by grant,[1] and raises in the person so asserting same, if otherwise unimpaired, a legal title to the fee which is effective for all purposes.[2] But in strictness, the statute of limitations does not operate to confer title the same as a grant. It is true, that may be its practical effect, yet it technically operates only to extinguish remedies which opposing claimants may have, thus leaving the occupant in unassailable possession.

In many states, ten, seven, or even five years uninterrupted possession under color of title, coupled with acts of ownership, payment of taxes, etc., will, under the operation of the statute, cure defects in the instrument under which the entry was made, and bar all actions for the recovery of the land, thus securing to the occupant a valid title in law, no matter how defective the title of the grantor or the instrument of conveyance may have been.[3]

Incidents of Title.

Generally.—There are several matters that properly command our attention in connection with the general subject of title, which, while they do not in themselves constitute title are nevertheless important factors in establishing or defeating same. These matters we may include in one general designation as *incidents of title.* They have reference to certain acts or proceedings which occur in the devolution of title and are designed as measures of protection to those who may properly invoke their aid.

[1] Sherman v. Kane, 86 N. Y. 57; Schneider v. Botsch, 90 Ill. 577.

[2] Covington v. Stewart, 77 N. C. 148.

[3] Consult local statutes.

Notice.—Inseparably connected with the subject of title is the legal doctrine of *notice*, or the knowledge of facts concerning the rights and interests of parties in real property, which, under certain circumstances, is imputed to those who deal with same. Purchasers of land are conclusively presumed to have examined the title of the estates which they acquire and therefore to have notice of every fact disclosed by such examination as well as of every other fact which an inquiry suggested by the examination would have brought out. If these facts are inimical to the interests acquired or of such potency as to overcome the title purchased, the vendee will hold subject to same, as, having taken with notice, he is presumed to have had them in contemplation.

Notice may be *actual*, as where knowledge of a fact is directly brought home to the person to be affected by it, or, it is *constructive*, as where a party by any circumstance whatever is put upon inquiry, or where the law, on grounds of public policy, presumes knowledge by reason of the doing of certain acts. Actual notice may be either *express* or *implied;* that is, it may be shown by direct evidence or inferred from circumstances.[1] Thus, a party is chargeable with actual notice if he has knowledge of such facts as would lead a prudent man to make further inquiries, provided such inquiries, if pursued with ordinary diligence, would have furnished him with knowledge of the facts concerning which he is sought to be charged.[2] As, if A, being about to purchase land from B, should find that C was in the actual possession thereof, he thereby ascertains a fact which should induce inquiry as to the right by which C occupies the land. If he neglects to make this inquiry, which prudence certainly demands, and it should afterwards appear that C was in possession by virtue of a deed from B

[1] Knapp v. Bailey, 79 Me. 195; Oliver v. Sanborn, 60 Mich. 346; Lindley v. Martindale, 78 Iowa 379.

[2] Gaines v. Summers, 50 Ark. 322; Rover Iron Co. v. Trout, 83 Va. 397; Taylor v. Morgan, 86 Ind. 295; Curtis v. Moore, 152 N. Y. 159; Jacobs v. Morrison, 136 N. Y. 101; Mercantile Nat. Bank v. Parsons. 54 Minn. 56.

which he had neglected to place on record, the law would charge A with actual knowledge of this fact, notwithstanding he did not really know of it.[1] It will be seen, therefore, that notice involves some of the elements we have previously considered under the head of estoppel in that the law will not allow a party to plead the truth when such plea is inconsistent with his own acts. But in the case we have supposed, if A, having examined the records had found no conveyance to B, and having further ascertained that the property was vacant, had yet learned from C that he, C, had a deed therefor from B, the duty of inquiry would still exist. In the former event the notice would be implied, in the latter express, and in either case A's rights would be subject to C's superior equity. Again, if A, having made all the inquiries a prudent purchaser is expected to make, should finally buy with no notice of C's rights, the record not disclosing his title and the property being vacant, then A's equity would be superior to that of C and he would receive the protection of the law as a *bona fide* purchaser; that is, one who has bought in good faith.[2]

Whatever puts a purchaser on inquiry is equivalent to notice; i. e. knowledge of facts, and notice is always imputed to a party shown to be conscious of having means of knowledge which he does not use.[3]

There is some confusion in the books with respect to the difference between the terms "implied" and "constructive," when applied to notice. The latter term, however, is now generally taken to mean the notice which results from records by virtue of statutory law. The difference then would seem to be that one (constructive) is an inference of law, the other (implied) arising from inference of fact.[4] Perhaps we will come nearer to the essence of the distinc-

[1] Carr v. Brennan, 166 Ill. 108; Williamson v. Brown, 15 N. Y. 354.

[2] See, Anderson v. Blood, 152 N. Y. 285.

[3] Knapp v. Bailey, 79 Me. 195; Mercantile Bank v. Parsons, 54 Minn. 56; Canal Co. v. Rowell, 80 Cal. 114; Hoy v. Bramhill, 19 N. J. Eq. 563; Doran v. Dazey, 5 N. Dak. 167.

[4] See Wade on Notice § 5.

tion if we say one is a rule of law and one a presumption of fact. Purchasers of land are always charged with constructive notice of every fact implicating their title which the records may disclose, and, in the absence of fraud, will never be relieved against negligence in failing to examine same.[1]

Relation.—There is another important incident which finds frequent mention in transactions relating to title. It occurs where an act done at one time is given effect as of some antecedent period, and is called *relation.*

The doctrine of relation is a fiction of law, adopted by the courts solely for the purpose of justice, and is applied, in conveyances of land, to equitable titles which subsequently mature, either by act of the parties or by operation of law, into legal titles; and when several acts concur to make a conveyance, the original act will be preferred, and to this the other acts are said to have relation. It is therefore more frequently employed where several proceedings are required to perfect a conveyance of land, and is designed for the security and protection of those who stand in some privity with the party that instituted the proceedings and acquired the equitable claim or right to the title.

The doctrine finds many applications in the law of real property and covers a wide field, but its essential features may be illustrated as follows: Thus, where a deed is made in pursuance of a prior contract, which has been duly recorded, such deed will be held to relate back to the date of the contract and convey the title as it stood at the time the contract was made.[2] The theory in such case is that the alienee of the incipient interest may claim that the grant inures to his benefit by an *ex post facto* operation. In this way he receives the same protection at law that a court of equity could afford him.

The same doctrine also applies to grants of unlocated land, the subsequent location operating by relation to the original

[1] Bunn v. Lindsay, 95 Mo. 250; McPherson v. Rollins, 107 N. Y. 316; Ahern v. Freeman, 46 Minn. 156; Knapp v. Bailey, 79 Me. 195; Taylor v. Morgan, 86 Ind. 295.

[2] Welch v. Dutton, 79 Ill. 465.

grant.[1] It also finds a very common employment in case of sales on executions issued under judgments,[2] the sale in such case relating back to the time when the judgment became a lien and cutting off all intermediate interests.

The doctrine of relation effects only parties and privies,[3] and does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.[4]

[1] Dequindre v. Williams, 31 Ind. 444.

[2] Kirk v. Vanberg, 34 Ills. 440; Hicks v. Skinner, 71 N. C. 539.

[3] Heath v. Ross, 12 Johns (N. Y. 140.

[4] Gibson v. Chouteau, 13 Wall. (U. S.) 92.

CHAPTER V.

THE PARCELING OF LANDS.

The methods of land measurements employed in the United States — The divisions of the public domain — Making and effect of plats and subdivisions — The vacating and cancelling of same — The employment of plats in conveyancing and their effect in dedications.

Generally considered.— We have heretofore considered the nature of the *corpus* of real property, or the tangible subject-matter that forms the substance of same, as comprised in the term "land," as well as the interests that may be held therein and the methods by which such interests may be divested and acquired. But in order that the land-owner may be protected in the enjoyment of his estate and rendered secure in his title thereto, it is necessary that the superficial area and boundaries of his claim shall be definitely and accurately established. In all cases of original grant the specific quantity of land conveyed must, in some manner, be ascertained, and this quantity, in conveyancing, is known as the *parcel*. To accomplish this a *description*, certain in its character and capable of actual location, must be provided. To meet this further want a system of measurements has been devised, and the adaptation of this system to practical uses in the parceling of land is technically known as *surveying*. The method employed for the computation of areas and the measurement of distances is further known as *plane surveying*.[1]

In the primary division of the public lands, and usually in all subsequent subdivisions of considerable area, the measurements are made with what is called a "gunters chain,"[2]

[1] It is said that the ancient science of geometry grew out of the practice of surveying, and its origin is ascribed to the changes which annually took place from the inundation of the Nile, and to the consequent necessity of adjusting the claims of each person respecting the limits of lands.

[2] So called from the name of its inventor.

which consists of a metal chain sixty-six feet long and composed of one hundred links. Twenty-five of these links make one rod; but in practice rods are now seldom used, distances being taken in chains and links. In smaller parcels, particularly of urban property, distances are taken in feet and inches. The contents of land are usually estimated in miles, acres and hundredths of an acre[1] Small parcels in populous cities, and occasionally in other places, are sometimes estimated in square feet and inches.

In nearly every part of the country west of the Alleghany mountains lands are described according to the government survey, or the original divisions, boundaries and areas made by the National government for the primary disposal of its lands. In a vast multitude of cases no other division is required and no other description is employed in subsequent transfers between individuals. Where small or irregular shaped tracts are formed, additional lines and measurements are necessarilly called for, but in every instance the ultimate reference is to the original tract from which the smaller parcel has been segregated.

American System of Land Parceling.—Not the least interesting of the peculiar institutions of the United States, is the method of land parceling adopted by the Federal government. Like many other incidents of the American land system it bears neither resemblance nor analogy to anything in use prior to its adoption, and in all its essential particulars is distinctively a product of American inventive skill. It is in perfect accordance with the sphericity of the earth, thereby securing a uniformity which by any other method would be impossible of attainment, while by the simplicity of its details it supersedes the intricate descriptions connected with surveys made according to the old geometrical systems.

The method is known as the *rectangular* system. It came into existence with the first accession of public territory and has been in successful operation ever since. Its merits lie in its economy, simplicity, brevity of description

[1] An acre is a quantity of land containing 160 square rods, in any shape. 640 acres make one square mile.

in conveyancing, and the accuracy with which tracts may be located. The security of titles under this system has been one of the potent factors in the rapid settlement and disposition of the public lands, and although the system has been extended over hundreds of millions of acres, including every variety of soil and climate and occupied by people of almost every race, litigation as to boundaries has been extremely rare. The positions of all tracts are shown by the surveys on the ground, in strict conformity to law, so that even when the monuments by which they are indicated perish under the consuming influence of time, they can still be identified, and their boundaries determined with unerring accuracy.

The certainty, simplicity and convenience of the system has recommended its adoption to the other countries of the western hemisphere and it is not without the bounds of reason to predict that, in time to come, it will form the basis of all methods of land parceling in every portion of the habitable globe.

Divisions of the Public Domain.—The public lands of the United States are ordinarily surveyed into rectangular tracts bounded by lines conforming to the cardinal points, according to the true meridian.[1] The largest of these divisions, called a *township* is a body six miles square, having reference to an established principal *base line* on a true parallel of latitude, and to a longtitude styled a *principal meridian*, and contains (as near as may be) twenty-three thousand and forty acres. The townships are subdivided into thirty-six tracts, each one mile square, called *sections*, and

[1] This system, which is essentially American in all its details, was reported from a committee of congress May 7, 1784. Thomas Jefferson was the chairman of this committee, and to him the credit of its invention is usually accorded, but beyond the committee's report its origin is not positively known. It is thought the square form of states, provided in Virginia's deed of cession of her western territory, may have influenced Mr. Jefferson in favor of a square form of surveys, although in the colony of Georgia a square form of surveying had been in vogue in eleven townships for fifty years prior thereto.

containing (as near as may be) six hundred and forty acres. Any number or series of contiguous townships situate north or south of each other constitute a *range.*

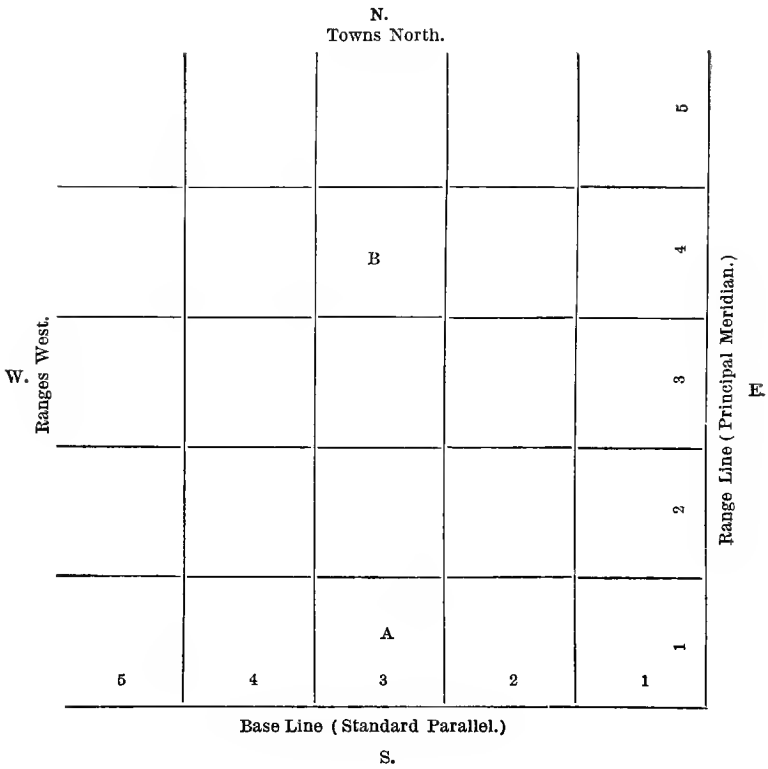
As it is impossible to strictly follow the letter of the law in regard to the public surveys, owing to the convergency of the meridians, an inequality develops, increasing as the latitude grows higher. The excess or deficiency is added to or deducted from the western or northern ranges of sections or half-sections in each township according as the error may be in running the line from east to west or from north to south. Standard parallels, or, as they are usually termed, *correction lines,* are established at stated intervals to provide for or counteract the error that otherwise would result from the convergency of meridians, while *guide meridians* are also provided at regular distances.

The townships are designated by a regular series of numbers counting north or south from the base line, and the ranges bear numbers in respect to the meridian line according to their relative position to it either east or west. All of these matters go to make up the description. Thus in describing a six hundred and forty acre tract, according to government survey, we say: Section sixteen, Town thirty-nine North, Range fourteen, East of the third Principal Meridian.

The arrangement as well as the method of numbering the towns and ranges is shown in the diagram on following page.

Each of the squares in the diagram represents a township, or a tract six miles square. It will be perceived that the square designated as A lies in town one north, and range three west; that the square designated B lies in town four north, range three west.

The sections are the smallest tracts the out-boundaries of which the law requires to be actually surveyed. Their minor subdivisions are defined by law and are designated by imaginary lines dividing the sections into four quarters of one hundred and sixty acres each, and these in turn into quarter-quarter sections, of forty acres each. The thirty-six sections into which a township is subdivided are numbered



consecutively commencing with section one at the northeast angle and proceeding west to section six; thence proceeding east the sections number to twelve, and so on alternately until the number thirty-six in the southeast angle. The accompanying diagram will serve to illustrate the method of running the exterior lines of townships and sections.

N.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

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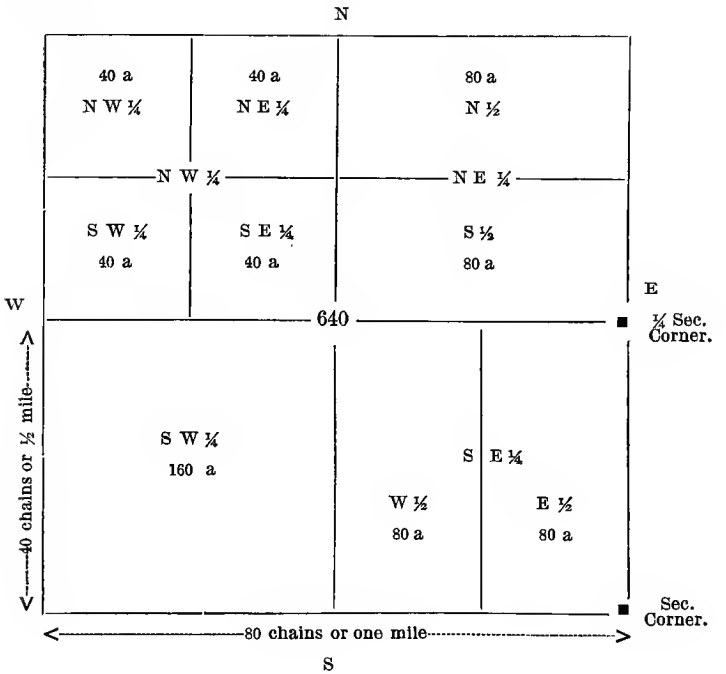
Subdivision of Sections.— Though the section is the smallest division of public land the lines of which are actually run by the government surveyors, smaller divisions are contemplated by law, and provision is always made for their ready ascertainment, which is done by running true lines from one established point to another. Thus, in the execution of the public surveys, section and quarter section corners are required to be established at every eighty and forty chains respectively. In the subdivision of sections the course to be pursued is to run straight lines from these established quarter section corners to the opposite corresponding corners and the point of intersection of the lines so run will be the corner common to the several quarters, in other words, the legal centre of the section. In the subdivision of quarter sections the corners should be placed at points equidis-

tant between the section and quarter section corners and between such quarter corners and the common centre of the section.

These legal subdivisions may be again divided in practically the same manner as the section, the quarter-quarter section yielding four quarters of ten acres each and there is no legal objection to still further quartering this last division. So too, the division may be by halves instead of quarters and the process of dividing by halves may be continued as long as any appreciable land remains. By these methods a section may be divided into recognized legal subdivisions affording at least forty different descriptions, and presenting areas varying from a 640-acre tract to a $2\frac{1}{2}$-acre parcel.

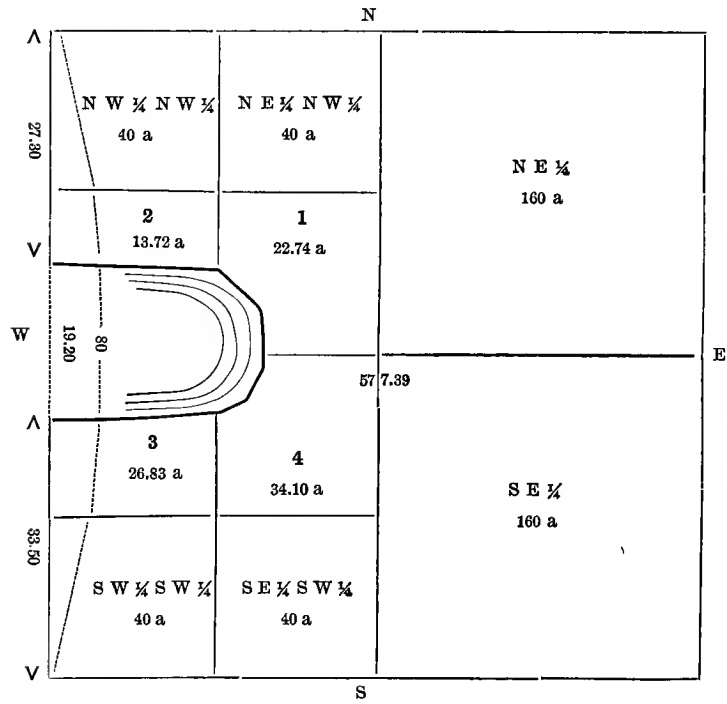
The shape and area of the sectional subdivisions will be better understood, perhaps, by reference to the following diagram:



The foregoing illustration contemplates only an ordinary survey, where no obstacles intervene to interrupt the symmetry of the map, or interfere with the running of the lines; nor does it provide for deficiencies or excesses, which will frequently occur in sections 1, 2, 3, 4, 5, 6, 7, 18, 19, 30 and 31, the greatest discrepancy being found in section 6. The legal presumption is, however, that the section contains six hundred and forty acres.

The section and quarter-section corners are established as indicated in the diagram; the half-quarter sections are not marked in the field, but are regarded by the law as points intermediate between the half-mile or quarter-section corners.[1]

Where navigable lakes, streams, etc., intercept the sur-



[1] Act of April 24, 1820.

veys they produce fragmentary divisions known as "fractional" sections, quarters, etc., the divisions of a fractional section being also known as "lots." *Meander* corner posts are established at all those points where township or section lines intersect the banks of such rivers, bayous, lakes or islands as are by law directed to be meandered, and the courses and distances on meandered navigable streams govern the calculations wherefrom are ascertained the true areas of the tracts binding on such streams. In the sale of such fractional tracts or lots, which always conform, as near as may be, to the size and shape of the regular subdivisions, the specific lot is sold by the acreage as returned by the government surveyors.

The diagram on preceding page will serve to illustrate the subject more fully. The fractional lots are numbered 1, 2, 3 and 4 and usually, in conveyancing, the tracts are described by these lot numbers, thus: "Fractional lot No. One of the North West quarter of Section Ten," etc.

Rectangular surveying.— The rectangular system of surveying above described has now been in operation in the United States for more than one hundred years.[1] Its advantages over other methods, as previously stated, consist in its economy, simplicity in the process of transfer, brevity of description in deeding the premises, and in the convenience of reference of the most minute legal subdivision to the corners and lines of sections.[2] The principal base, principal meridian, standard parallels and guide meridians constitute the framework of the rectangular system of public surveys, and there are at present permanently established twenty-three principal bases and thirty principal meridians,[3] controlling the public surveys in the land states and territories. The whole constitutes a scientific structure which has been

[1] It was formally adopted May 20, 1785.

[2] These are divided into six numerical meridians, and twenty-four independent meridians named after the locality which they control.

[3] See Zabriskie's Land Laws, 508; Instructions Comm'r Gen. Land Office, May 3, 1881; Government Manual of Surveying, 1883.

extended over the greater portion of the western continent,[1] and upon this foundation of meridians and intersecting bases rests the entire work of division and subdivision of the national territory. The larger portion of the vast area of the United States has been completely surveyed by this system, the field notes recorded and accurate plats projected which exhibit, in legal subdivisions, the entire surface.

Ordinarily the public surveys are governed by one principal base and principal meridian, but in a few districts and on the Pacific slope a number of different initial points are necessitated by abrupt mountains throughout the district.

The lines of public surveys over level ground are measured with a four-pole chain of sixty-six feet in length, eighty chains constituting a mile; but where the features of the country are broken and hilly a two-pole chain is used. The lines and corners thus run are marked and perpetuated by blazing trees, stones, mounds or other monuments, the witness monuments, bearings and distances being ascertained and described in the field-notes of the survey.

Meander lines.—In surveying fractional portions of the public lands bordering on navigable lakes or rivers what are called *meander lines* are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser.[2] Fractional divisions, made so by the interference of water, are designated and sold by the numbers attached to the lots, and reference is always had to the notes of survey. The water in these notes is always the boundary, and where there exists a difference between the meandered line as run and the existing line of the water course, the latter and not the former is to be considered the true boundary.[3] Yet, though a meandered line is generally considered as following the windings of a

[1] The land system of Canada is modeled upon the best features of that of the United States.

[2] Railroad Co. v. Schurmeir, 7 Wall. (U. S.) 272.

[3] Boorman v. Sunnucks, 42 Wis. 233; Houck v. Yates, 82 Ill. 179.

stream, the question whether it does so or not may be determined by evidence *aliunde*, and the mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government; and it has been held that an entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river.[1]

Where fractional pieces of land are patented, bounded in part by a stream or bayou, the original plat may be resorted to, and the lines as originally run will control. This is the rule adopted in determining controversies between contiguous proprietors of fractional lands, the patentees and those claiming under them being restricted to the boundaries as shown by the plats and field-notes. In all cases where land is made fractional by a navigable water-course, the patentee purchases by the plat, and a patent for a fractional part of a quarter-section on one side of a water-course, where the area sold is noted on the plat of the fractional tract called for by the patent, will not extend his entry and purchase across the stream, so as to embrace that part of the quarter on the other side.[2]

Plats and subdivisions.—Agricultural lands are seldom subjected to any other division than that afforded by the government survey, but in cities, towns and villages the necessities of society require a minute subdivision into what are popularly termed *blocks* and *lots*. Original subdivisions again become subject to re-subdivision, and these re-subdivisions in turn are not infrequently divided to meet the exigencies of social or business relations.

The formal act of resurveying is technically termed a *subdivision;* the result of the survey when projected upon paper, a *plat*. These subdivisions and plats play an important part, both in conveyancing and in the examination

[1] Lammers v. Nissen, 4 Neb. 245. But see Wright v. Day, 33 Wis. 260, and authorities last cited. This rule would probably apply only where the discrepancy between the meandered line and the water is gross and palpably indicates an error.

[2] McCormick v. Huse, 78 Ill. 363.

of titles, and upon them no small portion of the validity of land titles rests. In every community of any appreciable size, lands are conveyed and described with special reference to these plats and subdivisions, the government survey being referred to only incidentally and for the purpose of greater certainty in locating the particular tract which forms the subject of the plat.

Where a conveyance gives no other description of the land than the lot or block of a survey or subdivision, the authentic plat of such survey is as much a part of the deed as if set out in it,[1] and a reference to a plat is as effective by way of estoppel as express words of grant or covenant.[2] A reference to a plat by lot and block has usually a more controlling influence than a special description; and when a designation by lot is followed by a description by metes and bounds embracing an area less than the lot, it has been held to import an intent of the grantor to convey the whole lot, the law presuming the addition to be merely an intent to give a more particular description.[3]

Formal requisites of plats.—The formalities attending platting and subdividing of land are the subject of express statutory provisions in all the states, and, unlike deeds, there are no common and uniform methods, each state providing its own system of platting and authentication. Ordinarily the plat must show the shape and exterior boundaries of the land it is intended to represent, and of each subdivision thereof; the length and courses of all boundary lines; the monuments erected in the field; and the name of the tract so divided, as well as the streets, etc., shown thereon, together with the width of such streets, alleys, etc. Appended to the plat there must usually be a description of the land surveyed, officially certified by the surveyor, and a certificate of acknowledgment by the owner or owners of the land. In addition, municipal regulations sometimes require an approval by the civic authorities.

[1] Dolde v. Vodicka, 49 Mo. 100; Powers v. Jackson, 50 Cal. 429.

[2] Baxter v. Arnold, 114 Mass. 577; Cox v. James, 45 N. Y. 557.

[3] Rutherford v. Tracy, 48 Mo. 325.

Registration of plats.—The laws of all of the states provide for the filing or registration of plats, and, as a rule, when so filed or recorded they impart notice in the same manner as deeds. When duly executed, acknowledged and recorded, as provided by law, a certified copy of a plat and subdivision may be used in evidence to the same extent and with like effect as in the case of deeds, and by statute such registration and acknowledgment is usually made to operate as a conveyance in fee-simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public, or any society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives, to such donee or grantee for their use, or for the uses and purposes therein named or intended, but for no other use. And the portion of the land intended for any street, alley, way or common, or other public use, will be held in the corporate name of the municipality in trust to and for the uses and purposes set forth or intended.[1] Selling by a plat which has not been recorded is also a misdemeanor in many of the states.

Vacation and cancellation of plats.—At present nearly the entire doctrine of plats and subdivisions is statutory. Ordinarily a plat may be vacated by the owner of the premises, at any time before he has disposed of any of the property, by a written instrument declaring such intention, executed, acknowledged or proved, and recorded in like manner as deeds of land. Such a declaration, duly recorded, usually operates to destroy the force and effect of the recording of the plat so vacated, and divests all public rights in the streets, alleys, public grounds, etc., laid out or described in such plat.[2] This is the most simple manner. In some states, however, more formality is required, frequently rendering necessary the intervention of a court, as well to authorize the initiation of proceedings as to approve of such as may

[1] See R. S. Ill. 1845, p. 115; Id. 1874, p. 771; R. S. Wis. 1878, p. 645.

[2] R. S. Ill. 1874, ch. 109, § 6.

be taken.[1] The effect is practically the same in either case both as to the owners and the public.

Dedication by Plat.—Where a dedication to public use is sought to be established from the acquiescence of the owner in the use of the property by the public, or from acts or declarations of an equivocal character which are consistent with a dedication to the public use, or to the mere permissive use by the public for a temporary though indefinite period of time, the intention of the owner in permitting such use is unquestionably of controlling influence and importance in determining whether property has been dedicated by the owner to public use or not.[2] But where the dedication is clearly manifested by unequivocal acts or declarations, upon which the public or those interested in such dedications have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declaration is of no consequence;[3] therefore if the owner of land subdivides and plats same, or lays out and establishes a town or any addition thereto, and makes and exhibits a map or plan of such town or addition, with streets, alleys, public squares, etc., and sells the lots with reference to such map or plan, the purchasers acquire, as appurtenant to their lots, all such rights, privileges, easements and servitudes represented by such map or plan to belong to them, or to their owners, and the sale and conveyance of lots according to such map implies a grant or covenant, for the benefit of the owners of the lots, that the streets and other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map, on the faith of which the lots are sold.[4]

If the owner of land indicates by a map, or other unequivo-

[1] R. S. Wis. 1878, ch. 101, § 2265.

[2] Dillon, Mun. Corp. § 498; Irwin v. Dixon, 9 How. 30; Manderschid v. Dubuque, 29 Iowa, 73; Godfrey v. City of Alton, 12 Ill. 29; Ress v. Chicago, 38 Ill. 322.

[3] Lamar County v. Clements, 49 Tex. 347.

[4] Lamar County v. Clements, 49 Tex. 347; Huber v. Gazley, 18 Ohio. 18; Logansport v. Dunn, 8 Ind. 378; Beaty v. Kurtz, 2 Pet. 566.

cal acts or declarations, that a particular lot or square is to be reserved or applied to a particular or specific use of a *quasi*-public character, and such as to induce purchasers of contiguous or neighboring lots to give a higher price than they otherwise would, the use to which such lot was to be appropriated would no doubt be a *reservation*, and not, strictly speaking, a dedication to public use. But, nevertheless, the difference, so far as the owners of lots purchased on the faith of such reservations are concerned, is merely nominal; for the owner of the property who thus sells it is estopped from appropriating the land so reserved to a purpose inconsistent with that for which it was reserved, or he will be held by such sale to have created a servitude in the property reserved in favor of the dominant estate which he has conveyed, which will prevent his applying the reserved property to any other purpose than that for which it was reserved.[1]

Ordinarily the fee does not follow a dedication, but remains in the original proprietor burdened with the public use; but in a statutory dedication, by making and recording a plat, the fee passes as an incident and is held by the municipality for the use and benefit of the public.[2] An important distinction will therefore be made betwen a *common-law* and a *statutory* dedication.

As a necessary sequence, where the title of one who makes a dedication fails, the dedication also fails; but if the owner of the title recognizes the dedication, as where there has been a plat made by the one whose title has failed and the true owner deeds lands according to the plat, he will thereafter be estopped from denying the dedication.[3]

[1] Harrison v. Boring, 44 Tex. 255; Commonwealth v. Rush, 14 Pa. St. 186.

[2] Manly v. Gibson, 13 Ill. 308; Railroad Co. v. Joliet, 79 Ill. 25.

[3] Gridley v. Hopkins, 84 Ill. 528.

CHAPTER VI.

THE CONVEYANCE OF REAL PROPERTY.

The operative instruments of transfer of proprietary rights—Origin and historical development—Features, incidents and forms common to all deeds—Writing and arrangement—The parties—The consideration—The subject matter—The covenants—The conditions—The facts of execution, signing, sealing and delivery—Attestation—Acknowledgment—Registration—Minor incidents—Elements of construction.

Generally considered.—The transfer of an estate in real property, and incidentally the devolution of the title thereto, is called a *conveyance*. The medium of transfer, or operative instrument of conveyance, may be a deed, will, or other agency authorized or recognized by law as efficient for the purpose. It is customary to speak of these instruments as being themselves conveyances, but, in strictness, they are only the evidences of conveyance. The practical application of the principles we have been considering in the foregoing chapters is exhibited in the drafting, operation and effect of these instruments, which, in technical phraseology, is called *conveyancing*. Formerly conveyancing was a very abstruse and exceedingly complicated science, but modern legislation and judicial construction have stripped the old forms of their redundant verbiage, and many of the technical principles relating to common-law conveyances have become wholly, or in a great measure, inapplicable.

While all devolution of title, not effected by operation of law, must now be evidenced or proved by a writing, except where the statute of limitations is invoked, yet the requirement of a formal written instrument is comparatively recent. It will be remembered that the ancient method of investiture was by a public delivery of the possession, or, as it was termed, a livery of seizin, and this remained the only method of transfer of a corporeal hereditament until the introduction of uses. It would seem, however, that in time the old strictness of the investiture by livery became very much relaxed

and the testimony of the witnesses was not conducive to the certainty which marked the proceeding in its earlier days. This led, during the twenty-ninth year of the reign of Charles II (1676) to the passage of the celebrated *Statute of Frauds*, which provided, among other things, that no conveyance of lands, or any interest therein, should be valid in law unless evidenced by an instrument in writing. This occurred nearly seventy years after the first settlement of Virginia, and only one hundred years prior to the revolution.

But long before the enactment of the statute of frauds written deeds had been in use. In the case of common-law conveyances, or, as they were called, *feoffments*, it was customary, particularly in gifts which contemplated more than a life estate in the feoffee, to express the terms of the gift by a writing called a *charter*, but this was practically by way of explanation only as the giving of such charter or deed of feoffment did not obviate the necessity of a livery of seizin.

After the enactment of the statute of Frauds a written deed became imperative and while the old ideas of seizin long remained to vex the conveyancer the theory of delivery of possession was reduced to a mere symbolical delivery, as a twig, or a key, or some other object taken from or connected with the property conveyed, until finally the delivery of the deed itself was taken and held to be sufficient. The subject of delivery will be discussed in its proper place in the work and we may close this preliminary view with a repetition of the opening statement that a conveyance is now effected only by a writing, except in those cases where it results from operation of law.

Forms of conveyance.—For practical purposes we may reduce the forms of conveyance under derivative titles to two general kinds—*deeds* and *wills*. The subject of wills is reserved for a subsequent chapter. In this chapter will be discussed the features, incidents and forms, common to all deeds; in the chapter immediately following will be shown

the different species of deeds, together with their operation and effect.

All of the different kinds of deeds now in common use in this country are but variations of two original forms which had their origin in England and have been transmitted to us with the rest of our inheritance of the common law. These forms are known respectively as *deeds-poll* and *indentures*, or deeds *inter partes*. Originally the former was used where an obligation was incurred, or an estate was conveyed, by only one of the parties to the transaction, the other being a mere recipient; the latter, on the other hand, contained mutual transfers or covenants, the one in exchange for the other. A deed-poll was a single instrument, signed by one party and delivered to the other; an indenture consisted of two or more parts, of the same tenor, executed in duplicate by both parties, and interchangeably delivered by one to the other. The name is said to have originated from the practice of writing both parts of the agreement upon one parchment, and then cutting them asunder in acute angles.[1] The portions of the deeds where the severance was made thus resembled *teeth*, whence the name "indenture."[2] One of the marked distinctions between deeds-poll and indentures is in the designation of the parties. In deeds-poll the grant is made in the first person, while in indentures the parties are described in the third person.

The phrase, "this indenture," still forms the initial to deeds of bargain and sale, though such conveyances are in effect deeds-poll, and affords another instance where common-law forms of expression have been retained after their original meaning and technical significance have been lost. Although the forms have been retained, the practical dis-

[1] See 2 Wash. Real Prop. 587; 2 Black. Com. 294.

[2] Indentures seem to have come into use about the time of John and were at first employed as a safeguard against fraud. Each of the parties signed one of the duplicate instruments and delivered it to the other. A letter of the alphabet, or some other device was made on the parchment at the line of severance and afterwards if any dispute arose, the test of genuineness was made by fitting the parts together so as to show the whole letter or device.

tinction between deeds-polls and indentures has ceased to exist; and, while indenture is the proper and customary form for deeds *inter partes*, it is not uncommon to find deeds-poll in fact that employ the formula of indentures.[1]

Incidents of deeds.— The earlier writers describe a number of "requisites"[2] or "circumstances"[3] necessary to a valid deed; but the early "requisites" have been greatly augmented in modern times by the addition of new "circumstances," while many of the things that formerly were deemed essential are now unknown. In connection with the various items formerly called "requisites," and which still find employment in modern conveyancing, we may also consider a number of matters which, while not strictly requisites, are certainly circumstances, and for the purpose of convenience all of these matters may be grouped under the general head of *incidents*. This will include the general form and arrangement of a deed; the parties thereto; the subject-matter of the grant; the covenants and conditions which may accompany it; the consideration which supports it; the circumstances relating to execution, acknowledgment, delivery and registration, and such minor incidents as may seem to require mention.

1. *Writing and Arrangement.*

General rules—Component parts of Deeds.—It is an old rule that while a deed may be expressed in any language or characters, it must be written on parchment or paper.[4] In-

[1] Deeds are now invariably construed as agreements between the parties; yet a deed-poll, in form, does not purport to be an agreement, but is rather a declaration of some particular person or persons, addressed to all mankind, and informing them that the grantors have given to the grantees certain lands which they describe. The formal commencement is, "Know all men by these presents, that I," etc. An indenture is phrased to witness an agreement between parties and commences, "This indenture made, etc., between John Jones party of the first part and John Smith party of the second part, witnesseth, that the party of the first part has given," etc.

[2] 2 Black. Com. 296.

[3] Cruise, Dig., title 32 ch. II.

[4] 2 Black. Com. 297; Cruise, Dig., title 32, ch. II.

deed, Blackstone affirms that if written on any other material it will be no deed, and succeeding writers have continued to reiterate the statement. As a matter of fact, linen is now much used in some departments of conveyancing,[1] and no question has been raised as to its legality; and while the elementary writers have scrupulously adhered to the common-law direction regarding material, yet there can be no doubt that a valid deed may be written upon any durable material not liable to alteration or easily susceptible of erasure.[2]

It is a further rule that there must be words sufficient to specify the agreement and bind the parties, and that same must be legally and orderly set forth.[3] That is, the writing should show the parties, express the consideration, and describe the grant, both with respect to the estate and the land on which it is to be exercised. Custom and long usage have prescribed the order and arrangement in which these facts should be stated and in some instances the statute has done the same, yet, as a rule, a deed is not required to follow any form provided the essential facts are mentioned and the intention to convey is clear. Courts will always coustrue a deed liberally and with a view to give it effect.[4] But while courts will not, if it can be avoided, suffer a deed to be invalidated for mere defect of form, yet it is always safer, in a matter of so grave importance as a conveyance of land, to have a proper regard for the forms, as well as the phraseology, which have become settled by long continued use and judicial decisions.

It would seem that the early deeds were extremely short, as suited the rude simplicity of the times; but as conveyancing grew more complicated, it became customary to divide them into several distinct parts. Much formality was formerly employed in framing a deed according to these conventional divisions, but custom has long since reduced the

[1] Particularly in the matter of plats and subdivisions and the dedication of lands.

[2] The oldest existing deeds in the world are written on clay.

[3] Cruise, Dig., tit. 32, ch. II.

[4] Cross v. Weare Com. Co., 153 Ill. 499; Harlowe v. Hudgins, 84 Tex. 107.

phrasing of these parts to comparatively brief clauses, while the legislatures of some states have practically abrogated the larger portion of the ancient formal parts.

The formal parts of a common-law deed are as follows:

The *premises*,[1] which consists of the introductory part, including the date (although this is sometimes placed at the end), the parties, the consideration, recitals inserted by way of explanation, the words of grant, the description of the property conveyed, and exceptions from the grant, if any.

The *habendum*,[2] which declares the estate or interest granted, although this may also be done in the premises.

The *tenendum*, which accompanies the *habendum*. In the old deeds this was used to express the tenure by which the estate granted was held. In modern conveyancing it is mere form.

The *reddendum*,[3] or reservation to the grantor of some new thing in the land.

The *conditions*, or recitals qualifying, limiting or restricting the use and enjoyment of the estate.

The *covenants*, or collateral promises of the performance or non-performance of certain acts, or agreements as to the existence or non-existence of certain things.

The *testimonium* or *conclusion*, reciting the fact of execution and the date, either expressly or by reference to the beginning.

This form of deed, with minor differences, depending on locality, was exclusively used in the United States for many years, and is still employed to a considerable extent. Within a comparatively brief period, however, an attempt has been made in a number of states to simplify the forms of conveyancing by statutory enactments, prescribing models or precedents for the ordinary deeds in common use and declaring their effect. The radical difference between these

[1] Meaning the first, or that which goes before.

[2] Beginning with the words "To have and to hold," etc.

[3] This is an important clause in conveyances by lease, or grants for years, and is generally expressed in the term "Yielding and paying," etc. The reservation of rent.

statutory forms and those derived from the common law lies in the fact that they are entirely without *habendum*, and that the force and effect of the covenants, when the deed is intended to carry covenants, have been transferred to and merged in the operative words of grant.

At present statutory forms are very generally in use in many localities, their brevity and simplicity commending them to the unskilled conveyancer, but on referring to the statutes which declare their effect it will be found that the principles which gave rise to the old forms have not been abolished or superseded and that, to obtain an adequate idea of what the statute contemplates we are necessarily compelled to resort to the old forms. Nor will the brief precedents furnished by the statute suffice, as a rule, for anything more than the most simple and direct forms of conveyance. Whenever any special feature intervenes in the grant recourse must still be had to the form and phraseology of the old methods.

2. *The Parties.*

Generally Considered.—It is fundamental that to every valid grant there must be *grantors* competent to give[1] and *grantees* capable of taking.[2] If a conveyance of land has resulted as the effect of a preliminary treaty, and represents the consummation of a contract previously made and concluded, it must be the intelligent and capable act of the parties on either side; if it has been induced by other motives, or if the grantor has assumed to act without the actual concurrence of the grantee, it must still, so far as he is concerned, be the result of free will and a just comprehension of the nature and effect of what he has done. A grantor, therefore, to successfully accomplish the contractual undertaking expressed by a deed, must possess the *mental capacity* to give the necessary legal assent, should have attained the requisite *legal age* to render his engagements binding, and

[1] Whitaker v. Miller, 83 Ill. 381.
[2] Garnett v. Garnett, 7 T. B. Mon. (Ky.) 545; Douthitt v. Stinson, 63 Mo. 268.

should rest under no *disability* depriving him of legal capacity. Possessed of these qualifications he may make any disposition of his property that his judgment, fancy or caprice may prompt, provided that in so doing he contravenes no rule of law or principle of equity.

While the law presupposes that every contract is the intelligent act of the parties to it, entered into upon a fair understanding of its purport and consummated with a knowledge of its effects, yet, in the conveyance of land, it often happens that the grantee is but a passive recipient, with no voice, and even without mind. The conveyance may have been none of his seeking, and at the time of its execution unknown to him; and while neither the burdens nor advantages of property can be thrust upon a person without his assent, yet, as the possession of property is so universally considered a benefit, the absence of express dissent is ordinarily presumed to indicate assent and concurrence.[1]

So, too, while it is essential to the validity of a conveyance that it be to a grantee capable of taking and of proper identification, yet far less strictness is observed with respect to capacity, etc., in case of grantees than in case of grantors, and few of the disabilities which encompass the latter are applicable to the former.

Description of Parties.—No person can take a present estate under a deed unless named in same as a party, and the *habendum* can never introduce one who is a stranger to the premises to take as a grantee[2] (though he may take by way of remainder); yet, where the grantee's name has been omitted in the premises, if the *habendum* be to him by name, his heirs, etc., he takes as a party and the defect is cured.[3]

In the draughting of instruments it may sometimes happen, through inadvertence or mistake, that the name of the grantor has been entirely omitted in the body of the deed;

[1] Bundy v. Iron Co., 38 Ohio St. 300; Bivard v. Walker, 39 Ill. 413; Davenport v. Whitsler, 46 Iowa, 287.

[2] Blair v. Osborne, 84 N. C. 417; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73.

[3] Lawe v. Hyde, 39 Wis. 346.

and while it has been held that one who signs, seals and delivers a deed is bound by such acts as grantor, although not named as such therein,[1] the current of later decisions would indicate that such a deed is ineffectual to convey any interest or pass title.[2] Where only a portion of the grantors named in a conveyance sign and acknowledge same, the authorities are somewhat divided as to the effect of the deed. Some hold that where the deed shows that it was intended to be jointly executed by all the parties, an execution and delivery by a portion only is incomplete and does not bind them.[3] A majority of the cases, however, favor the contrary doctrine, and seem to sustain the principle that the parties executing will be bound thereby, and the deed be sufficient to pass their interests.[4]

If the true owner of land conveys by any name, the deed, as between him and his grantee, will transfer title, and in all cases evidence *aliunde* is admissible to identify the actual grantor.[5] In like manner, though the grantee be described by a wrong name, as is not infrequently the case, parol evidence may be resorted to for the purpose of showing the person actually intended.[6] Nor is it essential that the grantee be specifically named provided a sufficient description is furnished to distinguish the person intended from all others.[7]

[1] Elliott v. Sleeper, 2 N. H. 525; Thompson v. Loverin, 82 Pa. St. 432.

[2] Harrison v. Simmons, 55 Ala. 510; Laughlin v. Fream, 14 W. Va. 322; Peabody v. Hewitt, 52 Me. 33; Bank v. Rice, 4 How. 225.

[3] Arthur v. Anderson, 9 S. C. 234.

[4] Story, Part., § 119; Parsons, Part., § 369.

[5] As where a deed purports to be from John O. Black, and is signed "J. O. Black," parol evidence is admissible to show that James O. Black was the identical person who in fact executed the deed. Wakefield v. Brown, 38 Minn. 361.

[6] As where a deed is made to a married woman by her maiden name; Scanlon v. Wright, 13 Pick. (Mass.) 523.

[7] Where a deed was made to Margaret Pitcher and her *children*, it was held that the number and names of the children then living might be ascertained and that they would take as tenants in common with the mother; Hamilton v. Pitcher, 53 Mo. 334.

But where the grantee is neither named, nor described, by terms sufficiently certain to permit of identification;[1] or where the grantee named is dead;[2] or where no grantee is named or described,[3] the deed is void.

In drawing a deed all of the parties should be fully and properly described. This is necessary not only for the purpose of identification but also to furnish notice to subsequent purchasers and others legally interested. In every instance the full christian name should precede the surname. Initials tend to create uncertainty. Again, some description of the person should in most cases follow the name. In compliance with this rule it is customary to insert the place of residence, but formerly the occupation of the parties, as "merchant," "mariner," "gentleman," etc., was also appended. Where but one name appears as a grantor the same should invariably be followed by a statement of his domestic condition, as "bachelor," "widower," etc., otherwise a question is raised as to whether all of the necessary parties have joined.

Division of the Subject.— With respect to parties, considered in their contractual relations, they may be classed as

(a) persons *sui juris*, or such as act independently and in their own right;

(b) persons *under disability*, or such as are, by reason of their condition, legally incapacitated or disqualified to act;

(c) persons *incompetent*, or such as lack natural capacity for intelligent action; and

(d) *fiduciaries*, or such as act under a power for or on behalf of some other person.

These classes will be briefly considered in their order.

(a) *Persons Sui Juris.*

Generally.— Under this head may be classed both natural persons and corporations, including all those who possess legal capacity to contract and are not affected by

[1] Morris v. Stephens, 46 Pa. St. 200; Thomas v. Marshfield, 10 Pick (Mass.) 364, in this case the grant was to a "Neighborhood;" See, Booker v. Tarwater, 138 Ind. 385, for a discussion of a deed made to the "heirs" of a living person.

[2] Hunter v. Watson, 12 Cal. 363; Thomas v. Wyatt, 31 Mo. 188.

[3] Whitaker v. Miller, 83 Ill. 381.

the disabilities hereafter mentioned. The rights, duties, powers and privileges of these persons receive incidental mention throughout the work, and nothing further is required in this connection beyond a passing allusion. We may with profit, however, briefly notice two species of this class.

Partners.— It is a rule, which admits of but few exceptions, that one partner, during the continuance of the partnership, has no power to convey the real estate of the firm either by deed or assignment; nor to make any contracts in relation thereto specifically enforceable against the others; and, unless expressly authorized, deeds so made which profess to transfer the property of the absent partner or incur liabilities in regard to same are absolutely void as against the partner who did not join.[1]

Nor will a conveyance to one partner, or to a firm in which but one partner is named, be effective to vest title in the firm. Thus, a deed to John Smith & Co. will, at law, have the effect of vesting title in John Smith alone,[2] a firm name not being a sufficient naming of the grantee. It has been held, however, that this may be regarded as a latent ambiguity which may be explained by parol,[3] and in equity the partner so taking would be treated as holding the legal title in trust for the partnership. A grant to John Smith & Son, however, would be effective as in this instance one of the grantees, though not specifically named; is yet sufficiently discribed to admit of identification, while as a general rule grantees may always take under the general designation of "sons," "daughters," or "children."

Corporations.— For our present purposes corporations may be classed as *municipal* and *private;* the former including all of the subdivisions and agencies of the state, the

[1] Ruffner v. McConnel, 17 Ill. 212; Jackson v. Sanford, 19 Ga. 14; Goddard v. Renner, 57 Ind. 532. See page 103 for a statement of the partnership relation to real estate of the firm.

[2] Arthur v. Webster, 22 Mo. 378; Winter v. Stock, 29 Cal. 407; Gassett v. Kent, 19 Ark, 607; Barnet v. Lachman, 12 Nev. 361.

[3] Murry v. Blackledge, 71 N. C. 492.

latter all companies and associations of individuals whether formed for *quasi*-public or strictly private purposes. Both of these classes, under general or special conditions, have the power to acquire, hold and transmit the title to real property. Private corporations are further divided into *religious* and *lay*, but the distinction has lost its ancient significance so far at least as respects the acquisition of land.

Corporations, though regarded in law as persons for certain purposes, are not entitled to the privileges of citizens [1] as guaranteed by the federal constitution, neither in the state of their creation, nor in other states which they may enter for the purpose of business. Their right to acquire and transmit property is a statutory one in the home state, and in another state is based upon the comity between the states. In the latter case it is a voluntary act of grace of the sovereign power,[2] and is inadmissible when contrary to its policy or prejudicial to its interests.[3] A corporation has only such powers as its charter gives it, either expressly, or as incident to its existence; and in determining whether a given act is within the power of a corporation, it is necessary to consider, first, whether the act falls within the powers expressly enumerated in the charter or defined by law; and second, whether it is necessary to the exercise of one of the enumerated powers,[4] and these apply both to the acquisition and

[1] Although a corporation is not a citizen within the several provisions of the constitution, yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the state where it was created. Railway Co. v. Whitton, 13 Wall. 270. This, however, applies more particularly to controversies in the federal courts.

[2] Ducat v. Chicago, 48 Ill. 172; Insurance Co. v. Commonwealth, 5 Bush (Ky.), 68; State v. Fosdick, 21 La. Ann. 434.

[3] Carrol v. East St. Louis, 67 Ill. 568.

[4] Vandall v. Dock Co., 40 Cal. 83; Pullan v. Railroad Co. 4 Biss. 35; Weckler v. Bank, 42 Md. 581; Matthews v. Skinner, 62 Mo. 329. In determining whether a corporation can make a particular contract, it must be considered whether its charter or some statute binding upon it, forbids or permit it to make such a contract; and, if the charter and valid statutory law are silent upon the subject, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence,

transfer of real property. Land which a corporation cannot hold in its own name it cannot hold in the name of another, for when a corporation cannot hold the legal title to land it cannot take a beneficial interest in it.[1]

Statutes of mortmain.—The common-law right of corporations to take and hold real estate has been restrained in England from an early day by a series of laws called *statutes of mortmain*, which were passed to repress the grasping and rapacious spirit of the church, which was absorbing in perpetuity the best lands in the kingdom. They were called statutes of mortmain because designed to prevent the holding of lands by the *dead hand* of ecclesiastical corporations, which in early times were composed of members dead in law,[2] and in whose possession property was forever dead and unproductive to the feudal superior and the public.[3] This system of restraint, though originally confined to religious corporations, was subsequently extended to civil or lay corporations. The English statutes of mortmain, though they have been held in some of the states to be the law, so far as same are applicable to present political conditions, have not been specifically re-enacted in this country; yet the policy has been retained and is manifest in the general and special enactments of every state. As a rule the acquisition of lands beyond the corporate needs is forbidden and in some instances penalties are imposed for the retention of such acquisitions.

Power of acquisition—User.—There is a broad distinction between the power of acquisition by corporations and the use to which the property is to be applied, and the effect of this distinction upon the rights of third persons is equally marked. Where the charter of a corporation, or the general law under which it is orgauized, prohibits the purchase of lands for any purpose, a deed to it would be an utter nullity,

or whether the contract is entirely foreign to that purpose. Weckler v. Bank, 42 Md. 581; Watson v. Water Co., 36 N. J. L. 195.

[1] Coleman v. Railroad Co., 49 Cal. 517.

[2] Entering a monastery was one form of civil death.

[3] Ang. & Ames on Corp., § 148. And see 1 Black. Com. 479.

as its capacity to take is determined by the instrument or act which gave it existence;[1] but having the power to purchase and take, though for a specific purpose only, it becomes fully invested with title by a deed properly executed, even though the property be acquired and used for a purpose forbidden by the organic act.[2] As a rule, deeds to and from corporations are effective to convey the title, and title so derived cannot be impeached collaterally, nor its validity be questioned by third persons, on the ground that the transaction was beyond the corporate power; for where a corporation exceeds its powers, the remedy is by a direct action in the name of the state,[3] which alone can interfere.[4] Parties dealing with corporations are chargeable, however, with notice of the limitations imposed by the charter upon their powers.[5]

Municipal Corporations. — Municipal corporations are creatures of the statute, and can exercise only such powers as are expressly conferred, or such as arise, by implication, from general powers granted. Where the charter empowers a municipal corporation to buy and hold real property, it must be understood to be purchases made in the ordinary way, and for corporate purposes only; and a grant to purchase for particular purposes would seem to be a limitation on the power of such corporations, and to exclude, by necessary implication, all purchases for mere speculation and profit.[6] Municipal corporations, under a general grant of

[1] Leazure v. Hillegas, 7 S. & R. (Pa.) 319. Yet whether real estate has been acquired in excess of the corporate powers to take and hold cannot be made a question by any party except the state, who alone must assert her policy in that regard. Alexander v. Tolleston Club, 110 Ill. 65; Baker v. Neff, 73 Ind. 68.

[2] Hough v. Land Co., 73 Ill. 23.

[3] Smith v. Sheeley, 12 Wall. 358; Kelly v. Transportation Co., 3 Oreg. 189.

[4] De Camp v. Dobbins, 29 N. J. Eq. 36; Hayward v. Davidson, 41 Ind. 214. An act by a corporation in excess of its charter powers is said to be *ultra vires*. The doctrine of *ultra vires* is generally applied only to such contracts as remain wholly executory. Thompson v. Lambart, 44 Iowa, 239.

[5] Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43.

[6] City of Champaign v. Harmon, 98 Ill. 491. And see 2 Dill. Mun. Corp., § 433.

power to buy and hold land, may purchase within the corporate limits such property as may be necessary for corporate purposes, and may even buy and hold real estate beyond the corporate limits, for the location of cemeteries, pest-houses, etc.;[1] but in the absence of any enabling statute, cannot become purchasers of lands for merely speculative purposes.

Corporations as Grantees.—By common-law, and in the absence of statutory prohibitions, corporations aggregate, in whatever manner created, can take, like natural persons, by every method of conveyance known to the law.[2] No particular words of grant are necessary, other than those in common use in conveyances to natural persons; though it is usual to insert, as a word of limitation, the term "successors." The word is not necessary, however, to convey a fee-simple, independent of the statute which provides for a fee unless restrained by express terms or necessary implication, for, admitting that such a grant be strictly only a life estate, yet as the corporation, unless of limited duration, never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.[3]

The rules of conveyancing with respect to corporations do not materially differ from those which govern transactions between individuals, and though the corporation be inaccurately named in the deed this will not avoid same if enough is stated to identify the grantee intended.[4]

Corporations as Grantors.—All private corporations have an incidental right to alien or dispose of their lands, without limitation as to objects, unless restrained by the act of incorporation or by statute; and the power to mortgage,

[1] 2 Dill. Mun. Corp. § 435. The general rule is that municipal corporations cannot purchase or hold real estate beyond their territorial limits, unless this power is conferred by the legislature. 2 Dill. Mun. Corp., § 435. And see Denton v. Jackson, 2 Johns. Ch. 336; Chambers v. St. Louis, 29 Mo. 543.

[2] Am. Bible Society v. Sherwood, 4 Abb. (N. Y.) App. 227; Ang. & Ames, Corp., § 140.

[3] Overseers v. Sears, 22 Pick. (Mass.) 122; Congregational Society v. Stark, 34 Vt. 243; Ang. & Ames, Corp., § 141; 2 Black. Com. 109.

[4] Douglas v. Branch Bank, 19 Ala. 659; Society v. Varick, 13 Johns. (N. Y.) 38.

when not expressly given or denied, will be regarded as an incident to the power to acquire and hold real estate and to make contracts concerning same.[1] In general, they convey their land in the same manner as individuals, the laws relating to the transfer of property being equally applicable to both,[2] and the only features that particularly distinguish this class of conveyances from individual deeds are in the execution and acknowledgment.

(b) *Persons Under Disability.*

Aliens.—By the law of nations, a contract between a citizen and an alien enemy is void;[3] and this applies to conveyances of land as well as other forms of contract.[4] So too, it was formerly held to be against public policy to allow any person owing no allegiance to the government to own lands within its jurisdiction; and this doctrine still finds a recognition in some form in a number of states.[5]

The rule of the common law permits an alien to take land by purchase,[6] either deed or devise,[7] and to hold it against all persons but the state;[8] and, as the disabilities of the alien rest upon the fact of alienage and not upon his character, there is practically no distinction in this respect between an alien friend and an alien enemy.[9] The title held by him is not subject to collateral attack,[10] and may be sold and conveyed before any action taken by the state; and in such event the purchaser will hold same in all respects as though the conveyance had been made by a citizen.[11]

[1] Agricultural Society v. Paddock, 80 Ill. 263.

[2] Ang. & Ames on Corp., § 193.

[3] Brooke v. Filer, 53 Ind. 402; Fisher v. Kurtz, 9 Kan. 501.

[4] Dillon v. United States, 5 Ct. of Cl. 586; but compare Shaw v. Carlile, 9 Heisk, (Tenn.) 594; Conrad v. Waples, 96 U. S. 290.

[5] See 1 Warvelle on Vendors, 70, for a discussion of this subject.

[6] Doe v. Robertson, 11 Wheat. (U. S.) 332; Montgomery v. Dorion, 7 N. H. 475; Smith v. Zaner, 4 Ala. 99.

[7] Fox v. Southack, 12 Mass. 143; Guyer v. Smith, 22 Md. 239.

[8] Ramires v. Kent, 2 Cal. 558; Phillips v. Moore, 10 Otto (U. S.), 208; Scanlan v. Wright, 13 Pick. (Mass.) 523.

[9] Read v. Read, 5 Call (Va.), 207; Stephens Heirs v. Swann, 9 Leigh (Tenn.) 404.

[10] Norris v. Hoyt, 18 Cal. 217.

[11] Halsted v. Commissioners, 56 Ind. 363; Montgomery v. Dorion, 7 N. H. 475.

In a majority of the states, however, an alien is not distinguished from a citizen, so far as respects his rights of property, and his ability to make and enforce contracts in regard to same, and, generally, for the protection of his rights or the redress of his wrongs, he stands on the same ground as the citizen — equal before the law.[1]

In some states the policy is to discourage alien ownership of lands and while no restraints are placed upon acquisition the alien owner is not permitted to retain his lands beyond a specified time.[2]

Infants.— The age of legal competency has been generally fixed by statute at twenty-one years, although a departure from this rule is observed in some states in the case of females, who are permitted to attain majority at the age of eighteen years. As a general rule, persons who have not reached the statutory age above mentioned are disabled from entering into enforcible contracts. Under this rule a contract by a minor for the purchase or sale of real estate cannot be enforced against him after attaining majority, and the same reasons that permit the infant to repudiate his executory contracts allow him to disaffirm such as have been executed, and no conveyance from him during his minority will be binding upon him after he arrives at age.[3] During the interval between the execution of the instrument and the attainment of majority, the contract or conveyance can neither be said to be valid or void; nor can any act of his impart to it either character. It is simply voidable, and so remains until he shall decide the question for himself after he becomes of age.[4]

The deed of an infant, however, is by no means inoperative, and will suffice to transmit title with all of its inci-

[1] Local statutory policy may vary this rule but the text states the general doctrine.

[2] Usually five or six years. If the lands are not then disposed of they are subject to forfeiture by the state. Only a few states emyloy this barbarous rule.

[3] Harrod v. Myers, 21 Ark. 592; Cummings v. Powell, 8 Tex. 80, Green v. Green, 69 N. Y. 553; Kline v. Beebe, 6 Conn. 494.

[4] Dunton v. Brown, 31 Mich. 182; Keil v. Healy, 84 Ill. 104.

dents.[1] If he takes no steps to avoid it during the period allowed by law, the title will become unassailable for this cause; and while mere acquiescence during this period cannot be construed into a confirmation,[2] there are many cases where this, in connection with other circumstances, has been held to establish a ratification.[3] Where no specific time is fixed by statute, and this is the case in most of the states, it has, in a number of instances, been held that silent acquiesence, unaccompanied by other circumstances, for any shorter period than that prescribed by the statute of limitations would be insufficient to bar the right of disaffirmance;[4] but, on the other hand, a large and equally well considered class of cases maintains that, if the infant intends to avoid or disaffirm, he must make his election within a reasonable time after the removal of his disability;[5] and while specific performance will not usually be enforced against one out of possession, yet, if after coming of age he has entered or continues to hold and enjoy the property, or has received benefits therefrom, it will amount to confirmation on his part, and he will not be permitted to avoid the sale and refuse payment or reclaim the consideration already paid.[6]

It must further be observed that the privilege of infancy is not in all respects personal to the infant; and contracts, grants or deeds by a matter in writing, and which take effect by delivery of his hand, are voidable not only by himself during his life-time, but also by his heirs, or those who have his estate, after his decease; and his heirs may exercise

[1] Irvine v. Irvine, 9 Wall (U. S.) 617; Worcester v. Eaton, 13 Mass. 371.

[2] Boody v. McKenny, 23 Me. 517; Prout v. Wiley, 28 Mich. 164; Vaughn v. Parr, 20 Ark. 600.

[3] See Hartman v. Kendall, 4 Ind. 405; Fergusen v. Ball, 17 Mo. 374; Bostwick v. Atkins, 3 N. Y. 53.

[4] Peterson v. Laik, 24 Mo. 541; Hale v. Gerrish, 8 N. H. 374; McMurry v. McMurry, 66 N. Y. 175.

[5] Thompson v. Boyd, 13 Ala. 419; Hastings v. Dollarhide, 24 Cal. 195; Harris v. Cannon, 6 Ga. 382; Blankenship v. Stout, 25 Ill. 132.

[6] Robbins v. Eaton, 10 N. H. 561; Boyd v. McKenny, 23 Me. 517; Delano v. Blake, 11 Wend. (N. Y.) 85; Callis v. Day, 38 Wis. 643.

the same rights of disaffirmance within the same time that the infant himself might if living.[1]

Married women.—It was among the earliest formulated rules of the common law that the legal existence of a woman upon her marriage became suspended, and thenceforward during the coverture was merged entirely in that of the husband. As a consequence she was without capacity to take or hold real estate or to make any valid contracts in respect to same, and all her property became vested in the husband.[2] Equity early intervened to mitigate the severity of this rule, and the progressive spirit of the age did much to relax it, until finally legislation, reflecting the enlightenment of the times, abolished it altogether. The prevailing doctrine now is that coverture imposes no disability, and that a married woman has the same freedom of action and contractual ability as though she were sole.[3]

(c) *Persons Incompetent.*

Lunatics.—Persons of unsound mind, when such unsoundness amounts to an incapacity to understand and act in the ordinary affairs of life, have always been held incapable of making a valid contract.[4] Yet, while this is the recognized doctrine, it by no means furnishes a conclusive rule for the decision of all questions growing out of the contracts or deeds of demented persons. The circumstances attending particular cases have much to do with the application of the doctrine. Insanity is a mysterious disease, sometimes affecting the mind only in its relation to or connection with a certain subject, leaving it sound and rational as to others, and many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or

[1] Land & Loan Co. v. Bonner, 75 Ill. 315; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 248; Austin v. Charleston Seminary, 8 Met. (Mass.) 203; but compare Jackson v. Burchin, 14 Johns. (N. Y.) 127.

[2] 1 Black. Com. 126; 2 Kent, Com. 108.

[3] See Price v. Osborn, 32 Wis. 34; Westlake v. Westlake, 34 Ohio St. 621.

[4] Powell v. Powell, 18 Kan. 371; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 82 U. S. 9.

conversation the faintest trace of mental dearangement. It would be manifestly unjust, therefore, that such persons should be allowed to retain the property of innocent parties, or to retain their own property and its price; [1] and hence it may be said that where a purchase has been made from an insane person, and a deed of conveyance obtained in perfect good faith, before an inquisition and finding of lunacy, and with no knowledge of such lunacy on the part of the purchaser, and if the transaction has been in all other respects fair and reasonable, with no advantage taken by the purchaser, and if the conveyance was for a sufficient consideration, which was received by the lunatic, if the parties cannot be restored to their original positions, it will not be set aside.[2] This results, not because the contract was valid and binding, but rather for the reason that an innocent party, without fault or negligence, would be prejudiced by setting it aside. Both parties, in such a case, are faultless, and therefore stand equal before the law; and in the forum of conscience the law will not lend its active interposition to effectuate a wrong or prejudice to either, but will suffer the misfortune to remain where nature has cast it.[3]

The deed of a lunatic is not void, but, like that of other persons incompetent or disabled, voidable only, and is effectual to pass title with all its incidents if unassailed.

A lunatic may take and hold property the same as a sane person. In case of gift no question arises. In case of sale the features discussed above apply, but the mere fact of lunacy will not disqualify him or prevent him from holding the land.

Imbeciles.— Mere weakness of mind, when unaccompanied by any circumstances showing imposition or undue advantage,[4] forms no objection to the validity of a contract, for the law does not graduate intellectual differences on a

[1] Bank v. Moore, 78 Pa. St. 407; Young v. Stevens, 48 N. H. 133.

[2] Behrens v. McKenzie, 23 Iowa, 333; Scanlon v. Cobb, 85 Ill. 296; Freed v. Brown, 55 Ind. 310; Young v. Stevens, 48 N. H. 133.

[3] See remarks of Cole, J., in Allen v. Berryhill, 27 Iowa, 534.

[4] Mann v. Betterly, 21 Vt. 326; Young v. Stevens, 48 N. H. 133; Cain v. Warford, 33 Md. 23.

nicely adjusted scale; nor does it seem that partial insanity or monomania,[1] unless it exists with reference to the contract, will create incapacity unless coupled with other circumstances. That the mental powers have been somewhat impaired by age is not sufficient to invalidate a deed,[2] unless it can be shown that the purchaser took an unfair advantage of the vendor's mental condition; and if he be still capable of transacting his ordinary business, and understands the nature of the business in which he is engaged and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid and binding.[3]

Transactions with persons of feeble mind are always subject to close scrutiny, however, and, unlike those between parties of unimpaired mental faculties, will be set aside on slight grounds after the disability has been shown to exist.[4]

Persons born deaf and dumb are, by the common law, deemed *non compos mentis*, and without sufficient understanding to know and comprehend their rights and liabilities. The improved methods of educating such persons adopted at the present day develop in them a higher degree of intelligence, however, than it was formerly supposed they possessed, and to some extent has modified the ancient rule. Yet as the want of hearing and speech must necessarily prevent a full development of their intellectual power, and place them at a great disadvantage in their dealings with others, the law throws around them for their protection the presumption of incapacity to manage their own affairs until the contrary is shown.[5]

Drunkards.— Intoxication does not of itself render a contract void or relieve the contracting parties from its consequences.[6] Were it otherwise, drunkenness, it is said, would

[1] Burgess v. Pollock, 53 Iowa, 273.

[2] Lindsey v. Lindsey, 50 Ill. 79; Beverly v. Walden, 20 Gratt. (Vt.) 147.

[3] English v. Porter, 109 Ill. 285.

[4] Wray v. Wray, 32 Ind. 126; Cadwallader v. West, 48 Mo. 483.

[5] Oliver v. Berry, 53 Me. 206; Brower v. Fisher, 4 Johns. ch. (N. Y.) 441.

[6] Bates v. Ball, 72 Ill. 108; Joest v. Williams, 42 Ind. 565; Broadwater v. Darne, 10 Mo. 277.

be the cloak of fraud. Yet, under certain circumstances, a transaction may be avoided for this reason.

To avoid responsibility, however, on the ground of intoxication, the proof of mental incapacity must be very clear and convincing;[1] for a drunkard is not incompetent in the same sense as an idiot or one generally insane; [2] and the proof must show that at the time of the act in question his understanding was clouded or his reason dethroned by actual intoxication.[3]

When a man has been found an habitual drunkard by a legal inquisition, and his property placed in the hands of a conservator or committee, all business relating to the drunkard's estate must be transacted with such conservator or committee until the proceeding has been annulled or set aside.[4] The fact that the drunkard has sober intervals in no way alters the case, and during such intervals he has no more authority to deal with or dispose of his property than while he is in a state of intoxication; nor will the further fact that the other contracting party acted in good faith and with no actual notice of the inquisition confer upon him any additional rights or furnish ground for equitable relief.[5]

(d) *Fiduciaries.*

Generally considered.— A very large proportion of the sales of real estate in the United States are made through the media of fiduciaries and trustees. Such fiduciaries include not only trustees proper, but all who act under a power, as mortgagees, executors, guardians, etc.; and the same general principles are equally applicable to all of the different classes and relations.

Fiduciaries and trustees, if they exceed and violate their authority, are responsible, though no bad faith prompted their acts; and those who deal with them on the faith of the

[1] Bates v. Ball, 72 Ill. 108.

[2] Van Wyck v. Brasher, 81 N. Y. 260.

[3] Gardner v. Gardner, 22 Wend. (N. Y.) 526; Johns v. Fritchey, 39 Md. 258.

[4] Redden v. Baker, 86 Ind. 195.

[5] Wadsworth v. Sharpsteen, 8 N. Y. 388.

trust estate must be aware that they exercise only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that they confine themselves within their scope.[1]

Trustees.—A *trustee* is one in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another. Though the name is techanically applied to a particular class, it also, to a certain extent, comprises executors, administrators, guardians, assignees, etc.

A trustee cannot profit by his trust estate, nor become a purchaser at any sale thereof by him,[2] while the power under which he acts must in all cases be strictly pursued to render his acts valid.[3] A joint power of sale must be executed by all, provided all are living and in condition to act,[4] unless the instrument creating the trust provides otherwise;[5] for the interest held by several trustees is an entirety, and can only pass as a whole; hence, all the trustees living, having an interest in the property, must join in the conveyance, otherwise it will be wholly inoperative.[6] But in case of the death of one or more of the trustees, the survivor or survivors will hold the trusts and may execute the powers.[7] A deed by the survivors, representing the entire title, will be good, even though they are authorized to fill the vacancy, as it is only where the terms of the power creating the trust imperatively require the vacancy to be filled that the acts of the survivors will be invalid.[8]

Where the legal title of a trustee is created by the owner of the property, the right of the trustee to enforce it will be recognized everywhere; but where such title is derived solely

[1] Owen v. Reed, 27 Ark. 122; Ventres v. Cobb, 105 Ill. 33.

[2] Terwelliger v. Brown, 44 N. Y. 237. This is the universally accepted doctrine, but is subject to some qualifications, the law not exacting the same rigid degree of strictness in all the states. Clark v. Clark, 65 N. C. 655.

[3] Huntt v. Townshend, 31 Md. 336.

[4] Learned v. Welton, 40 Cal. 349.

[5] Gould v. Mather, 104 Mass. 283.

[6] Golder v. Brewster, 105 Ill. 419; Brennan v. Wilson, 71 N. Y. 502.

[7] Lane v. Debenham, 11 Hare, 188.

[8] Golder v. Brewster, 105 Ill. 419.

from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends.[1] Upon the death of a sole trustee, the legal estate devolves upon his heir at law; and the heir takes the same estate, and is subject to exactly the same duties and responsibilities, as his ancestor.[2]

Being founded on personal confidence, it necessarily results that a trustee cannot delegate his trust to others,[3] and is himself responsible for the acts of all his subordinates in whatever character they may act.[4]

Executors and administrators.—The real estate of deceased persons is frequently conveyed through the media of what are known as "personal representatives," consisting of *executors*, or persons specifically designated for that purpose by the decedent, and *administrators*, or persons who act by virtue of an appointment under the law.[5] In both cases they stand in the position of trustees of those interested in the estates upon which they administer. An executor may sell and convey lands held in special trust without the intervention of a court, but not such lands as are sold in due course of administration to pay decedent's debts; while an administrator can do no act affecting lands without the

[1] Curtis v. Smith, 6 Blackf. (Ind.) 537.

[2] Watkins v. Specht, 7 Coldw. (Tenn.) 585; McMullen v. Lank, 4 Houst. (Del.) 648. By force of the statute the trust sometimes vests in some tribunal in the county in which the real estate is situated, which, upon the application of some person interested in the trust, forthwith appoints a successor to the deceased trustee, whereupon the trust vests in the newly-appointed trustee. Collier v. Blake, 14 Kan. 250.

[3] Grover v. Hale, 107 Ill. 638. But where the trustee conveys the legal title to one having knowledge of the trust, or where such other person in any manner acquires the legal estate with such knowledge, he holds the property subject to the trust, and may be compelled, in equity, to execute it. Ryan v. Doyle, 31 Iowa, 53; Smith v. Walser, 49 Mo. 250.

[4] Moorecroft v. Dowding, 2 P. Wms. (Eng. Ch.) 314.

[5] "Legal" or "personal" representative, in the commonly accepted sense, means administrator or executor. But this is not the only definition. It may mean heirs, next of kin, or descendants. Warnecke v. Lembea, 71 Ill. 91.

special order of a court. In case of sales by either officer, no title passes until the execution and delivery of a deed, [1] and without such title as the deed conveys the purchaser cannot maintain or defend ejectment against or by the heir.[2]

Guardians.—The law permits conveyances by guardians, conservators, committees, etc., of the real estate of their wards whenever the sale of such property may be necessary or expedient for the payment of debts, the support of the ward, an investment of the proceeds, or other similiar conditions. Such property can only be sold, however, under the order of a court of competent jurisdiction, and a confirmation after sale is necessary to give it validity.[3] A conveyance by the guardian in any other manner is unauthorized; and where one purchases the real estate of a ward from a guardian, directed by order of court to sell it, notwithstanding he takes a deed from such guardian, if the sale is never reported to or confirmed by the court he cannot maintain his title against a subsequent conveyance by the ward after the termination of his wardship.[4]

Legal officials.—The conveyances of sheriffs, commissioners, masters in chancery, etc., are executed in a ministerial capacity, but for practical purposes they may be regarded as one class of fiduciaries, and to them the same general rules apply as govern other fiduciary relations.

3. *The Consideration.*

Generally considered.—The motive or inducement for a conveyance is termed a *consideration.* This may be either *good* or *valuable;* the former may consist of anything of merit, as the love and affection which a man bears to his

[1] A properly conducted sale, after confirmation vests the equitable title in the purchaser.

[2] Doe v. Hardy, 52 Ala. 291; Gridley v. Phillips, 5 Kan. 349.

[3] People v. Circuit Judge, 19 Mich. 296; White v. Clawson, 79 Mich. 188; Chapin v. Curtenius, 15 Ill. 427.

[4] Titman v. Riker, 10 Atl. Rep. 397.

kindred;[1] the latter consists of money or its equivalent—something that possesses a known value[2] or is capable of pecuniary measurement.[3] But among considerations classed as valuable the law now includes marriage, notwithstanding that it is not capable of measurement by a pecuniary standard.

The consideration may be *express*, as where the motive or inducement of the parties to the deed is distinctly declared, or *implied*, as in cases where the law presumes an adequate compensation. Where the deed is made without consideration it is said to be *voluntary*.

Effect of consideration.—No consideration was required in conveyances under the common law,[4] the homage and fealty incident to the same being deemed sufficient, but upon the introduction of uses the courts of equity held that a consideration was essential to support a use and when uses were finally recognized at law the law courts adopted the same idea, and held that a consideration was necessary to the validity of a deed of bargain and sale.[5]

[1] Story, Eq. Jur. § 354; Cruise, Dig., title 32, ch. II. 4 Kent Com. 464.

[2] Cruise, Dig., title 32, ch. II; Kittridge v. Chapman, 36 Ia. 348; Haughwout v Murphy, 21 N. J. Eq. 118; Savage v. Hazard, 11 Neb. 327; Wood v. Beach, 7 Vt. 522.

[3] Brown v. Welch, 18 Ill. 343; Palmer v. Williams, 24 Mich. 328; Busey v. Reese, 38 Md. 264.

[4] Thus in Plowden it is said, *arguendo*, that by the law of England there were two ways of making contracts for lands or chattels; the one by words, the other by writing; and because words were often spoken unadvisedly and without deliberation, the law had provided that a contract by words should not bind without consideration. But when the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made. Plowd. 308.

[5] At the present time the only practical operation of the expression of a consideration, or the introduction of a clause reciting a consideration, is to prevent a resulting trust to the grantor and estop him from denying the making and effect his deed for the uses therein declared. Meeker v. Meeker, 16 Conn. 383; Goodspeed v. Fuller, 46 Me. 141; Graves v. Graves, 29 N. H. 129; Jackson v. Alexander, 3 Johns. (N. Y.) 491; 4 Kent Com. 465.

As a general proposition, any valuable consideration, acknowledged or proved, is sufficient to sustain a conveyance of lands;[1] and the acknowledgment in the deed of payment of same is so far conclusive of the fact as to give effect to the conveyance.[2] A deed executed by the party in whom the title is vested, and expressing a valuable consideration, never needs, as against him or those claiming under him, or as against a stranger, to be supported by showing what other reason, in addition to the will of the party, led to its execution.[3] Nor is it essential to the validity of the conveyance that the consideration should be expressed,[4] and a deed, if properly drawn, will pass the title, whatever it may be, without reference to the consideration paid.[5] It is customary, and proper, to recite the consideration in the premises of the deed of conveyance, and usually the true amount of the price paid is so inserted. Sometimes, from various motives, this is not done and a nominal consideration only is recited, or possibly no statement is made. Thus, the recital may read that "in consideration of one dollar," or "for value received," the grantor conveys, etc., but for all practical purposes of conveyance such recitals are quite sufficient to support the deed.

Ordinarily, where parties contract by deed a consideration will be implied from the seal,[6] which as a rule imports consideration;[7] and it has been held that an instrument in form a conveyance and duly signed, whether under seal or not, imports a consideration;[8] while a voluntary conveyance,

[1] Jackson v. Leek, 19 Wend. 339.

[2] Ochiltree v. McClurg, 7 W. Va. 232; Hutch v. Bates, 54 Me. 142.

[3] Rockwell v. Brown, 54 N. Y. 210; Merrill v. Burbank, 23 Me. 538.

[4] Jackson v. Dillon, 2 Overt. (Tenn.) 261; Wood v. Beach, 7 Vt. 522; Boynton v. Rees, 8 Pick. (Mass.) 329.

[5] Fetrow v. Merriweather, 53 Ill. 278; Laberee v. Carleton, 53 Me. 211.

[6] Ross v. Sadgbeer, 21 Wend. 166; Evans v. Edwards, 26 Ill. 279; Croker v. Gilbert, 9 Cush. (Mass.) 130.

[7] Hunt v. Johnson, 19 N. Y. 279; Croft v. Bunster, 9 Wis. 503; Bush v. Stevens, 24 Wend. (N. Y.) 256.

[8] Ruth v. King, 9 Kan. 17. This in the absence of statutory requirements to the contrary.

without any consideration, either good or valuable, is valid and binding between the parties and their privies.[1]

As against the grantor and those in privity with him, the acknowledgment in the deed of payment is his receipt or admission, which on proof of the deed will be considered as proved.[2] Such acknowledgment, however, is not conclusive, being merely by way of recital;[3] and though it affords *prima facie* evidence of the fact, yet for the purpose of recovering the consideration, the grantor may still show that it was never, in fact, paid;[4] but not to invalidate the grant or defeat the operation of the deed.[5]

As against the creditors of the grantor such recital is but hearsay, and no evidence of the fact of payment;[6] but no one except a creditor can avail himself of the objection that the deed was given without consideration.[7]

Whenever a deed is assailed by one who claims and shows a right or interest in the property conveyed, adverse to the grantee, it must, to insure validity, be supported by an *adequate* consideration; otherwise it may be declared fraudulent as to such assailant. "Good" considerations, although meritorious, are not usually permitted to be effective in such cases; and, as a rule, to maintain a deed against the attack of creditors, owners of prior equities, etc., it must be founded upon some consideration which the laws deem valuable, and which is in some fair measure commensurate with the value of the land.[8] This requirement rests upon an entirely different principle from that which calls for a consideration as between the parties, and is designed as a measure of protection

[1] Fouby v. Fouby, 34 Ind. 433; Wallace v. Harris, 32 Mich. 380; Laberee v. Carleton, 53 Me. 211.

[2] Bayliss v. Williams, 6 Coldw. (Tenn.) 440.

[3] Huebsch v. Scheel, 81 Ill. 281; Parker v. Foy, 43 Miss. 260; Webb v. Peele, 7 Pick. 247.

[4] Barter v. Greenleaf, 65 Me. 405; Paige v. Sherman, 6 Gray (Mass.) 511; Grout v. Townsend, 2 Hill (N. Y.) 554.

[5] Bassett v. Bassett, 55 Me. 127; Newell v. Newell, 14 Can. 206; Richardson v. Clow, 8 Ill. App. 91.

[6] Redfield Mfg. Co. v. Dysart, 62 Pa. St. 62; Rose v. Taunton, 119 Mass. 99; Houston v. Blackman, 66 Ala. 559.

[7] Hatch v. Bates, 54 Me. 136.

[8] See Smith v. Allen, 5 Allen (Mass.) 454; Hutchinson v. Hutchinson, 46 Me. 154; Doe v. Horn, 1 Ind. 393; Ruth v. Ford, 9 Kan. 17.

to those who have a legal right to look to the land as a part of the assets of a debtor.

4. *The Subject-matter.*

Generally considered.—By the ancient rules of conveyancing the first "circumstance"[1] to a valid deed is that there be *persons* able to contract and be contracted with, for the purposes of the deed, and a thing or *subject-matter* to be contracted for; in modern times this rule is paraphrased to read: that to every valid grant there must be a *grantor*, a *grantee*, and a *thing granted.* The parties to a conveyance have already been noticed, and it remains now to briefly consider the subject-matter or the main ingredient of every deed.

While it is customary, and not altogether improper, to speak of the land as the subject of the conveyance, yet in strict legal contemplation it is the grantor's rights and interests therein, as comprehended in the generic term "estate," that is actually transferred. But as such rights and interests carry with them a dominion over the soil to which they relate, we may properly regard the subject-matter of a conveyance in a twofold aspect, and in this article the same will be considered

(a) with respect to the *land* conveyed, and

(b) with respect to the *estate* conveyed.

In the paragraphs which follow the subjects are discussed from the ordinary commercial standpoint, but the author must remind the student not to lose sight of the fundamental concepts which underlie this popular view and which were briefly presented in the introductory chapter.

(a) *The Land Conveyed.*

General principles.—Reference has been made in a former chapter to the parceling or dividing of lands, whereby the definite bounds of ownership may be fixed and established. The *parcel*, as previously explained, is determined by running lines in conformity with legal rules, and the contents of the area bounded by these lines forms the subject of the con-

[1] See Cruise, Dig., tit. 32, ch. II.

veyance. The enumeration of the courses and distances used in the measurement of the tract, or other words employed for the purpose of designation, is called the *description*. The object of a description, in a deed, is to define what the parties respectively intend, the one to convey and the other to receive, by such deed; and this intention is to be deduced from the instrument, as in the case of any other contract.[1]

Every deed of conveyance, in order to transfer title, must either in terms or by reference or other designation, give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty.[2] It is not essential, however, that the instrument should on its face ascertain the limits or quantity of the land granted or the particular property conveyed; but it will be sufficient if it refers to certain known objects or things, and provides definite means by which the same may be readily ascertained and known;[3] and where words of general description only are used, oral evidence may be resorted to for the purpose of ascertaining the particular subject-matter to which they apply.[4] Thus, a conveyance of all the lands belonging to the grantor, wherever situate, is not void for want of description, but will suffice to transfer the title to all lands in which the grantor may have any interest.[5] On the other hand, should a grantor convey "my house and lot at Chicago," with no other worder of designation, and it should appear that he owned more than one house and lot at Chicago the grant would be uncertain and, for that reason, void.[6]

[1] Long v. Wagoner, 47 Mo. 178; Kimball v. Semple, 25 Cal. 440.

[2] Whitaker v. Miller, 83 Ill. 381; Berry v. Derwart, 11 Reporter, 195; Long v. Wagoner, 47 Mo. 178.

[3] Coats v. Taft, 12 Wis. 388; Dwight v. Packard, 49 Mich. 614; Smith v. Westall, 76 Tex. 509.

[4] Coleman v. Improvement Co., 94 N. Y. 229.

[5] Jackson v. De Lancey, 4 Cow. (N. Y.) 427; Pettigrew v. Dobbelaar, 63 Cal. 396; but see, Linn v. Wright, 18 Tex. 317.

[6] See, Barnet v. Nichols, 56 Miss. 652; Hammer v. McEldowney, 46 Pa. St. 334; Lumbard v. Aldrich, 8 N. H. 31.

Certainty, therefore, is the indespensible requisite of a deed, but any description adopted by which the identity of the premises intended to be conveyed is established will be sufficient;[1] and a description not sufficiently certain in itself may be made so by reference to other deeds in which it is sufficient.[2] In the absence of references or other identifying circumstances, if the land be so inaccurately described as to render its identity wholly uncertain, the grant is void;[3] and the same rule applies with equal force to exceptions or reservations from the grant, which, though the grant may prevail, the exceptions may be void for uncertainty.[4]

At the present time, and particularly in the states formed from the territories, land is described by the terms of the government survey or by reference to the lines of plats of subsequent subdivisions. These descriptions are simple and accurate. Occasionally a description will employ the verbiage of the field notes of survey, as where a tract is of irregular conformation, but very rarely do we now meet with the old and crude forms which distinguished the conveyancing of even as late as one hundred years ago.

Where special descriptions are employed, as where the land is of such irregular conformation that it can only be located by describing in detail its exterior boundaries, measurements, etc., together with its relative position with respect to other lands, difficult problems are sometimes presented which necessitate the application of certain rules of construction as is shown in the succeeding paragraph.

Rules of construction.—The location of land, as gathered from the description, is governed (1) by natural objects or boundaries, such as rivers, lakes, mountains, etc.; (2) by artificial devices, such as marked trees, stakes, stones, etc., and (3) by course and distance. The two former classes

[1] Smith v. Crawford, 81 Ill. 296; Allen v. Bates, 6 Pick. (Mass.) 460; Smith v. Westall, 76 Tex. 509.

[2] Russell v. Brown, 41 Ill. 184; Credle v. Hays, 88 N. C. 321.

[3] Calcord v. Alexander 67 Ill. 381; Campbell v. Johnson, 44 Mo. 247; Dickins v. Barnes, 79 N. C. 490.

[4] Thayer v. Torry, 37 N. J. L. 339.

are technically known as *monuments*, the latter as *metes*[1] *and bounds*, and the monuments, courses, distances, or other descriptive matters are collectively termed *calls*. That is, the deed is said to call for certain monuments, courses, etc., and in applying the description to the land we do so according to the calls. By *course*, is meant the direction a line shall take; by *distance*, we mean the extent of the line. Thus, say a description commences at a stone fixed in the highway (this would be a *monument*); thence south along the line of the highway (this would be a *course*), two hundred feet (this would be a *distance*). All of these matters are *calls*. Added to the calls, as a sort of supplementary description, there may be an enumeration of the contents of the tract, as "containing twenty acres." This is termed *quantity*.

It is a general rule of construction that, in the description of land, the least certain and material parts must give way to the more certain and material. Quantity is never allowed to control courses and distances,[2] and courses and distances must yield to fixed monuments and natural objects also referred to therein.[3] But where the monuments, if once existing, are gone, and the place where they originally stood cannot be ascertained, the courses and distances when explicit must govern;[4] and where the boundaries are doubtful, quantity often becomes a controlling consideration.[5] Nor will the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance be enforced when the instrument would thereby be defeated, and when the rejection of a call for a monument would reconcile other parts of the description and leave

[1] Meaning, *measures*.

[2] Bishop v. Morgan, 82 Ill. 352; Saunders v. Schmaelzle, 49 Cal. 59.

[3] Dupont v. Davis, 30 Wis. 170; Sanders v. Eldridge, 46 Iowa, 34; Cunningham v. Curtis, 57 N. H. 157, Turnbull v. Schroeder, 29 Minn. 49.

[4] Drew v. Smith, 46 N. Y. 204; Clark v. Wethy, 19 Wend. 320; Bagley v. Morrill, 46 Vt. 94.

[5] Winans v Cheney, 55 Cal. 567; Higginbotham v. Stoddard, 72 N. Y. 94.

enough to identify the land.[1] Usually, however, where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object, and the distance disregarded;[2] but where no monuments are referred to, and none are intended to be afterward designated, the distance stated in the grant must govern the location.[3]

The principle from which we deduce the rule which requires course and distance to yield to monuments is, that all lands described in this way are supposed to be actually surveyed and it is presumed that the intention of the grant is to convey the land according to such actual survey; that mistakes in lines and measurements are more likely to occur than in set stones, marked trees, rivers, or other objects clearly designated and accurately described, and hence distance must be lengthened or shortened and courses varied so as to conform to those objects.[4] An erroneous description of land by numbers will not control other descriptive particulars which indicate the land with certainty.[5]

Where courses are described as northerly or southerly, without referring to a monument or providing other means of certainty, they will be taken to mean due north, or south, etc.,[6] and when a course is described as extending from one monument to another, without other descriptive words, a straight line is conclusively presumed to have been intended.[7]

Enumeration of Quantity.—Where as a part of the description, the quantity of the land conveyed is stated, it is the almost invariable custom to preface such statement with the word "about" or supplement same with the phrase

[1] White v. Luning, 93 U. S. (3 Otto), 515.

[2] Strickland v. Draughan, 88 N. C. 315; Whitelsey v. Kellogg, 28 Mo. 404.

[3] Negbauer v. Smith, 44 N. J. L. 72; Winans v. Cheney, 55 Cal. 567.

[4] McIver's Lessee v. Walker, 9 Cranch (U. S.) 173; Cunningham v. Curtis, 57 N. H. 157.

[5] Bradshaw v. Bradbury, 64 Mo. 334; Montgomery v. Johnson, 31 Ark. 62.

[6] Bosworth v. Danzien, 25 Cal. 296.

[7] Allen v. Kingsbury, 16 Pick. (Mass) 235.

"more or less". These words, notwithstanding their constant use, have comparatively little legal value, and are regarded as words of approximation only. The clause relating to quantity will usually be rejected as a part of the description of it is inconsistent with the actual area, and even though accompanied by no qualifying words will not give to either party a remedy as against the other for any excess or deficiency, unless the difference is so great as to afford a presumption of fraud.[1] The word "about," when used as qualifying the number of acres, indicates that a near approximation only is intended.[2] The words "more or less" have much the same meaning and show that the statement of quantity is merely an estimation. They are generally taken to mean that the parties assume the risk of a gain or a loss.[3] But when land is specifically sold by the acreage this term must be understood to apply only to small excesses or deficiencies attributable to the variation of the instruments of surveyors, or matters of a like nature.[4]

Double Descriptions.—Where, as is often the case, the conveyancer, from an over anxiety to identify the property, makes two descriptions, the one, as it were, superadded to the other, one description being complete and sufficient in itself, the other incorrect, the incorrect description or feature, or circumstance, may be rejected as surplussage, and the complete and correct description allowed to stand alone.[5] In the case of a specific and a general description in the same instrument the specific description will usually control the general.[6]

Nothing Implied in Descriptions.—It must be remembered, however, that, notwithstanding the utmost liberality

[1] Wadhams v. Swain, 190 Ill. 46; Belknap v. Sealey, 14 N. Y. 143.

[2] Stevens v. McKnight, 40 Ohio St. 341.

[3] Stebbins v. Eddy, 4 Mason (Cir. Ct.) 414.

[4] Benson v Humphreys, 12 Rep. 591.

[5] Kruse v. Wilson, 79 Ill. 233; Meyrs v. Ladd, 26 Ill. 415; Wade v. Deray, 50 Cal. 376; Credle v. Hays, 88 N. C. 321.

[6] Prentice v. Ry. Co., 154 U. S. 163.

is allowed in the construction of descriptions, so as, if possible to effectuate the intention of the parties, nothing passes by a deed except what is described in it, whatever the intention of the parties may have been, and extrinsic evidence is inadmissible to make the deed operate upon land not embraced in the descriptive words.[1]

Supplemental Matters—Appurtenances.—It is customary to supplement the description of the land conveyed by a further grant of all the appurtenances "thereunto belonging or in any wise appertaining." This expression is always found in the printed forms of deeds, except those prescribed by statute, and was formerly thought to be of great importance. Indeed the old cases indicate that without its employment only the principal thing would pass by the deed, but, as has been shown[2] whatever is necessary to the full enjoyment of the grant passes as an incident to the principal thing, and the presence or absence of the phrase in question is wholly immaterial.

Boundary lines—Highways.—It is a general rule that a grant of land bounded by a street or highway, whether the same be public or private, carries the rights of ownership to the middle of the way; and such is the established presumption governing the construction of deeds, in the absence of controlling words.[3] Nor does it seem essential, in order to carry a grant to the center of the highway, that the land should even be described as abutting or bounding thereon; and whenever land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee will still take the fee to the middle of the highway on the line of which the land is situated.[4]

It has been stated, as a reason for the rule, that the adjoining proprietors are presumed to have orignally furnished

[1] Coleman v. Improvement Co., 94 N. Y. 229.

[2] See p. 51, *ante*.

[3] Newhall v. Ireson, 8 Cush. (Mass.) 595; Champlain v. Pendleton, 13 Conn. 23; Buckman v. Buckman, 12 Me. 463; Moody v. Palmer, 50 Cal. 37.

[4] Gear v. Barnum, 37 Conn. 229; Stark v. Coffin, 105 Mass. 328; Hawesville v. Lander, 8 Bush (Ky.) 679.

the land in equal proportions for the sole purpose of a highway;[1] and hence in a grant of the ajacent land the soil to the center of the highway passes as a part of the land and not as an appurtenant.[2] Ordinarily the ownership of the soil of the street or road if of no practical use to the grantors of the adjacent property; and usually there is no purpose to be served in the retention by them of narrow strips or gores of land between the land conveyed and that of other proprietors, while for many purposes such ownership is of special importance to the purchaser.[3] It is presumed, therefore, that the grantor's land in a street passes under the general description in his deed of the adjoining land with which it is connected or to which it belongs as a part of the same tract, subject to the public use.[4]

Where the grantor does not own the land in the adjacent street or road the foregoing rules will not apply, and if by the calls of the deed the street is clearly excluded from the grant it will not pass.[5] So too, the rule as stated may be affected by the statutory policy of the state with respect to lands dedicated by plat, but the statement as made presents the established inference of the common law and it applies with the same force to city streets as to country highways.

Continued—Waterways.—The same general principles that control with reference to highways apply as well to streams and waterways. With respect to rivers not navigable by common law the owner of the land adjoining is *prima facie* owner of the soil to the central line or thread of the stream, subject to the public rights of navigation.[6] The presumption will prevail in all cases in favor of the riparian proprietor, unless controlled by some express words

[1] See Durham v. Williams, 37 N. Y. 251; Taylor v. Armstrong, 24 Ark. 107.

[2] Bissell v. Railroad Co., 23 N. Y. 54.

[3] Re Robbins, 34 Minn. 99.

[4] Gould v. Railroad Co., 142 Mass. 85; Paul v. Carver, 26 Pa. St. 225; Oxton v. Groves, 68 Me. 371; Kimball v. Kenosha, 4 Wis. 331; Marsh v. Burt, 34 Vt. 289.

[5] Tyler v. Hammond, 11 Pick. (Mass.) 193. But upon this point the authorities are not agreed.

[6] Hubbard v. Bell, 54 Ill. 110; Olson v. Merrill, 42 Wis. 203; Dean v. Lowell, 135 Mass. 55; Mott v. Mott, 68 N. Y. 246.

of description which exclude the bed of the river; and in all cases where the river itself is used as a boundary, the law will expound the grant as extending to the center or thread.[1]

Where the boundary is a lake of any considerable magnitude the grant extends only to low-water mark.[2]

Where land is bounded by a navigable stream, or by the sea, the rule is that all private rights cease at high-water mark, and that all beyond is *publici juris*, or vested in the state.[3]

It will be noted, however, that the common law test of navigability is the ebb and flow of the tide.[4] This test has practically been rejected in America and the rules which prevail in the several states are by no means uniform. Usually any stream navigable in fact is navigable in law. [5] Congress, by special provision, has fixed the status of all navigable streams and waterways, in what was formerly the public domain, by declaring that they shall be deemed to be and remain public highways, yet it is clear that Congress did not employ the words "navigable" or "non-navigable" in the sense of being affected by the ebb or flow of the tide. On the contrary it is obvious that the words were employed without respect to the tide, and were applied to territory situated far above tide waters, and in which there were no salt water streams. Viewed in this light the federal courts have adopted the rule that proprietors, under titles derived from the United States, bordering on streams not navigable, unless restricted by the terms of the grant, hold to the center

[1] Braxon v. Bressler, 64 Ill. 488; Ross v. Faust, 54 Ind. 471; Rice v. Monroe, 36 Me. 309; State v. Canterbury, 28 N. H. 195; Cox v. Friedley, 22 Pa. St. 124.

[2] Wheeler v. Spinola, 54 N. Y. 377; Stephens v. King, 76 Me. 197.

[3] See Tomlin v. R. R. Co. 32 Iowa, 106; Chapman v. Kimball, 9 Conn. 38.

[4] As the rivers of England were comparatively small, tide waters only were regarded as navigable, and the confusion of navigable with tide waters, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad difference existing between the typography and extent of the American continent and the British islands.

[5] See pg. 44 *ante*.

of the stream, while in case of navigable rivers the title of the riparian proprietor stops at the stream.[1] Riparian rights upon the great lakes have been held to be, in theory, the same as upon navigable streams.[2]

Exceptions and reservations. — A description may be qualified by what are known as *exceptions* and *reservations*. Probably few things connected with our subject are more perplexing to the student than the effect given to these terms, and this is heightened by the fact that they are frequently employed interchangeably by the unskilled conveyancer. Therefore, in order to obtain a clear comprehension of both terms it is necessary to firmly fix the following differentiation.

An *exception* is a withholding or withdrawal from the operation of the grant of some part of that which is granted, so that the title to the part excepted remains in the grantor as though no grant had been made. A *reservation* is the creation of some new thing which issues out of that which is granted for the benefit of the grantor. It does not affect the title of the land granted but gives to the grantor a right of use or enjoyment of a part of the granted property. Both a reservation and an exception must be a part, or arise out, of that which is specifically granted in the deed. The difference is that an exception is something taken back or out of the conveyance then existing and clearly granted, while a reservation is something newly created and issuing out of what is granted.[3] Thus, an exception is always a part of the thing granted, and of a thing in being;[4] a reservation is of a thing not in being, but is newly created out of the land demised.[5]

As these technical distinctions may be somewhat confusing let us suppose for the purpose of illustration, that A is

[1] R. R. Co. v. Schurmeir, 7 Wall. (U. S.) 272; Forsyth v. Small, 7 Biss. (Cir. Ct.) 201.

[2] See, Lincoln v. Davis, 53 Mich. 375; State v. Franklin Falls Co. 49 N. H. 240.

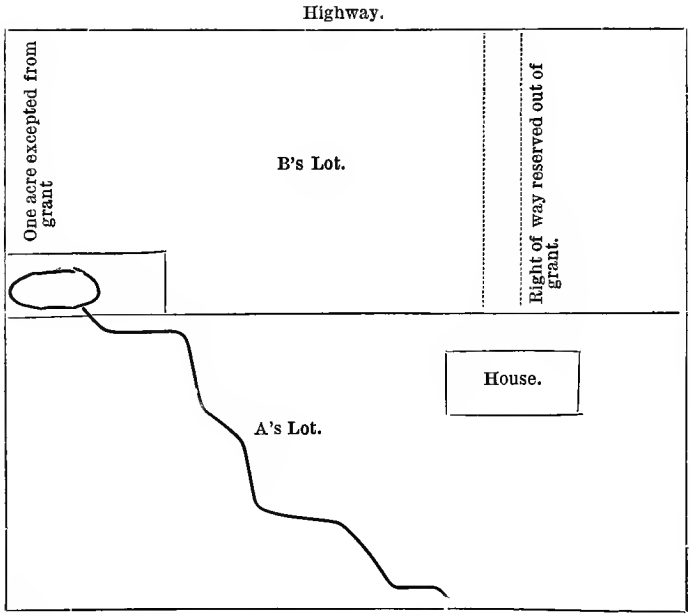
[3] Adams v. Morse, 51 Me. 497; Kister v. Reeser, 12 Rep. 377.

[4] Winthrop v. Fairbanks, 41 Me. 307.

[5] Gay v. Walker, 36 Me. 54.

the owner of two lots contiguous to each other. One of the lots he conveys to B by a proper description. In one corner of the land so conveyed there is a spring of water which flows through the land retained. In order that the water of this spring may not be diverted to the detriment of the stream which flows through his land he desires to retain control of same, therefore, in his deed of conveyance to B, after properly describing the entire lot he then adds; "excepting therefrom one acre in square form in the southwest corner of said land," or some phrase of similar import. Thus it will be seen that one acre has been taken back or out of the land granted; that same was then in being and a part of what was given. This then is an *exception* from the grant. Now let us suppose further, that along the north line of the lot conveyed to B there lies a public highway and that the only convenient way to reach this public road from A's land is over and across the lot sold, and that A desires to retain such a right of way. He could, as in the former case, except from the operation of the grant a strip of land, say ten feet wide, to which he would retain title. But all that he needs is an easement, therefore, he adds, after the description, a *reservation* of the privilege of ingress and egress over a strip of land ten feet wide which is definitely located. In this instance it will be perceived that unlike the one acre excepted, which was existent at the time of the grant, a new creation has been made—an easement, not before in being, has been raised and issues from that which was granted, and it is this feature which forms the cardinal distinction between the two methods. The following diagram will more fully explain the examples just given.

It will be further perceived, that the title to the one acre excepted remains in the grantor and that he holds same as of his former right; that the title to the strip of land reserved from the grant passes to the grantee but is burdened by the easement of way, and that the grantor holds such easement by what is equivalent to a new grant or conveyance.



Creation, Operation and Effect.—The usual operative words to create an exception are, "saving and excepting," etc., but the terms indicative of either method are often used indiscriminately and frequently in conjunction, as "excepting and reserving," etc., and the difference between the two is so obscure in many cases that it has not been observed.[1] Although there is a technical distinction between the terms, yet where "reserving" is used with evident intent to create an exception, effect should be given in that sense.[2]

A reservation in a deed will never operate to give title to a stranger, though it may, when intended by the parties as

[1] Winthrop v. Fairbanks, 41 Me. 307.

[2] Sloan v. Lawrence Furnace Co., 29 Ohio St. 268. As where a grantor sold land reserving the coal, it was held to be an exception, making the grantor the separate owner of the coal. Whitaker v. Brown, 46 Pa. St. 197.

an exception, afford notice to the grantee of adverse claims in or to the thing excepted or reserved.[1]

A restriction may take effect as a reservation if it does not necessarily deprive the grantee of the essential benefits of the grant.[2]

The same certainty of description is required in an exception out of a grant as in the grant itself; as, where a deed excepts out of the conveyance one acre of land, and there is nothing in the exception to locate it upon any particular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.[3] Reservations and exceptions, when expressed in a doubtful manner, are to be construed most strongly against the grantor;[4] yet if the intention of the parties can be fairly ascertained from the instrument, such intention will govern in its construction.[5]

It is a further rule that an exception must not be repugnant to the grant, otherwise it is void. Hence, it is said, the exception must be of a particular thing out of a general thing. Where land is granted in general terms, an exception of any specific portion or quantity is valid and not repugnant to the grant.[6] As a grant of the North East quarter, etc., "excepting the North ten acres thereof." But where the grant is of ten acres specifically, an exception of one acre, would be repugnant inasmuch as it assumes to

[1] West Point Iron Co. v. Reymert, 45 N. Y. 703. So where A granted land to B, reserving one acre to C. Being made to a stranger the reservation would be void, and therefore it was held to be an exception; Corning v. Iron Co., 40 N. Y. 209.

[2] Gay v. Walker, 36 Me. 54.

[3] Mooney v. Cooledge, 30 Ark. 640.

[4] Wyman v. Farrar, 35 Me. 64; Duryea v. New York, 62 N. Y. 592.

[5] Wiley v. Sirdorus, 41 Iowa, 224. Thus, where one granted his land, reserving the streams of water and the soil under them, with the right to erect dams, also, all such parts of the land as should be overflowed with water, for the use of mills belonging to grantor, it was held good as a reservation, though considered strictly as an exception, it was void for uncertainty; and, that, as a reservation, it was inoperative, until the grantor exercised his right by erecting milldams, etc. Thompson v. Gregory, 4 Johns. (N. Y.) 81.

[6] Sprague v. Snow, 4 Pick. (Mass.) 54.

withhold that which has been specifically conveyed.[1] It may be objected that this distinction is subtle and in such event the writer would be inclined to hold the objection well taken, but such is the law and we must take it as we find it. In drawing descriptions perhaps the better way, when it can be done conveniently, is to note the exception before the grant. This method tends to greater certainty and obviates to some extent the force of the objection just mentioned. Thus, commence the description as follows: "Except the north ten acres thereof, the North East quarter, etc. This, however, does not seem to be at all necessary as courts continually give effect to exceptions made after the grant.

The term "reservation" seems to have acquired a wider significance in this country than was accorded to it in England, and also to have lost some of the incidents of the place of its origin. It would seem to have been formerly used mainly with respect to rents or some provision which a grantor made or reserved to himself out of that which was granted. At present, while it still retains this character with respect to leaseholds, it is the form by which an easement, privilege or benefit is acquired by the grantor out of the thing granted, without respect to the character of the estate conveyed.

By the technical rules of conveyancing a reservation is made in the clause following the *habendum* and which is known as the *reddendum*. In formally drawn leases this order is generally observed with respect to the reservation of rent but in other grants it is not material where the provision is placed and usually it follows the grant.

Land held adversely. — "From an early date," says Washburn, "the policy of the law has not admitted of the conveyance, by any one, of a title to land which is in the adverse sezin and possession of another. This is considered, not as passing a title, but as the transfer of a right of action

[1] See, 3 Wash. Real Prop. 434; Cutler v. Tufts, 3 Pick. (Mass.) 272. As is said by one old writer: one may grant a farm, excepting the meadow, but to grant a pasture and meadow, excepting the meadow, would be repugnant and void. Shep. Touch. 79.

in violation of the early laws against champerty and maintenance, and therefore not to be sustained by the courts." [1] This doctrine was long maintained in this country, and may still prevail to a limited extent in some of the older states; [2] but in the west it has been swept away by express statutory enactments, and no conveyance is void because at the time of its execution or delivery the land in question is in the possession of another who holds by a title adverse to that of the grantor.[3] Where such doctrine still prevails, an entry on the land, and delivery there, will evade the letter of the law and make good the deed.[4] At most, the principle will apply only as to the person holding the adverse title at the time of the execution and delivery of the deed, or those claiming by, through or under him, and as to all others the deed would be valid and effectual.[5]

[1] 3 Wash. Real Prop. 329 (4th ed.) See, also, 4 Kent. Com. 446.

[2] Sohier v. Coffin, 101 Mass. 179; Jones v. Monroe, 32 Ga. 188.

[3] Hall v. Ashby, 9 Ohio, 96; Shortall v. Hinkley, 31 Ill. 219; Crane v. Reeder, 21 Mich. 82; Stewart v. McSweeney, 14 Wis. 471. Under these statutes any one claiming title to land, although out of possession, and notwithstanding there may be an actual adverse possession, may sell and convey the same as though in the actual possession, and his deed will give the grantee the same right of recovery in ejectment as if the grantor had been in the actual possession when he conveyed. Chicago v. Vulcan Iron Works, 93 Ill. 222.

[4] Farwell v. Rogers, 99 Mass. 36; Warner v. Bull, 13 Met. 4.

[5] Edwards v. Rays, 18 Vt. 473; Wade v. Lindsey, 6 Met. 407; Betsey v. Torrence, 34 Miss. 138; Farnum v. Peterson, 111 Mass. 151. The English statutes upon which this doctrine was founded grew out of peculiar exigencies entirely foreign to our condition and habits. They were passed at the close of revolutions, when, the property of the kingdom having to a great extent changed hands, it became the interest of those who succeeded to power to place every possible obstacle in the way of the former proprietors recovering possession.

The principal statute upon this subject, and the one which formerly influenced the decisions of American courts, is that of 32 Henry VIII, against selling pretended titles, and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession holding adversely to the claim. It was early conceded that the ancient policy which prohibited the sale of pretended titles, and held the convey-

(b) *The Estate Conveyed.*

Generally.—The primary object of a deed is to evidence the conveyance or transfer of an estate, and in former times no little ingenuity was displayed by conveyancers in framing grants of estates to meet and keep pace with the refinements and subtleties of courts. The marked differences in the land system of the United States as compared with those of England and other European nations have at all times been conducive to less complicated methods than were employed elsewhere, but within the last fifty years the abrogation of old laws, customs and usages has made the creation of estates a most simple and, in a majority of cases, easily understood matter. Technical words of grant and limitation were formerly a necessity to measure and define the nature and extent of the estate conveyed; but so comparatively valueless and without effect have they become, that the highest estate known to our law may be created and transferred without them. Covenants that formerly called for highly artificially constructed sentences may now be raised by a single word, and in every other department of conveyancing the departure from old methods is equally noticeable.

Good conveyancing still calls for apt language in the framing of deeds to raise and convey estates; and notwithstanding that the law will supply by implication many of the draughtsman's omissions, yet it will not raise or create estates in opposition to expressed intent, however erroneous such expression may be; nor will it cut down estates which result by implication because of a neglect to insert the proper language to create such lesser estates. Circumstances may induce a modification of this rule where equity is appealed to for relief in cases of fraud, accident or mistake, but at law the rule holds good without exception.

ance to a third person of lands held adversely at the time to be act of maintainance, was founded upon a state of society which does not exist in the United States, yet the doctrine prevailed very generally in all parts of the country until very recent years and was even incorporated into the statutory law of some of the States.

Creation of Estates.—Estates are determined, as a rule, by the effect to be given to certain words employed in connection with the grant which are called respectively, words of *purchase* and *limitation.* A word of purchase is one which indicates the person or class of persons who are to take. A word of limitation denotes the extent or duration of the estate which the purchaser is to take. Thus, say a grant is made to John Jones (these are words of *purchase*—they tell who is to take) his heirs and assigns (these are words of *limitation*—they denote the extent and duration of the estate).

All persons who take under a deed are called *purchasers.* The word "purchaser" as already explained, has no special reference to bargain or sale, or to barter of any kind, but means a person who acquires an estate otherwise than by descent. In the illustration just given John Jones is the purchaser, the estate being given to him. But apparently it is also given to his "heirs and assigns", they being coupled with him in the grant. This, however, cannot be true as a living person can have no heirs and not until he shall dispose of the land can he have any assigns. Then as these latter do not exist it is clear they could not have been intended as parties; that is, as purchasers. What is intended must be that John Jones shall have the land either to keep and transmit to his posterity or to sell and dispose of at his pleasure—in other words, that the land is his without any restriction. And because these terms indicate such rights they may be said to define or limit the estate.

The word "limitation," in its ordinary acceptation, is suggestive of restriction. If we say a thing is limited we mean that it has definite bounds beyond which it cannot extend. Hence it will sometimes happen that its employment in connection with estates has a confusing effect on the mind of the student. Particularly is this true when used in the transfer of an estate in fee. If we say an estate is given for a term of twenty years, or for life, there will be no difficulty in understanding that the expressions "for twenty years" or "for life" are words of limitation because they do, of themselves,

clearly indicate the time the estate is to last; in other words they specifically limit its duration. But can we not say that an estate is to last for all time as well as for one year? And if we do so grant an estate do we not limit or designate its bounds quite as much as though we had fixed upon a short and definite period? Then if we say a purchaser shall have his estate as long as his blood continues—in other words as long as he shall have heirs, it is just as effectually limited as though we had given it to him for a year, or until he should have attained the age of fifty years, or until he should die.

Creation of Estates in Fee.—An estate in fee-simple, as defined in the old books, is when a man takes by a grant to himself and "his heirs forever," and hence it is an unvarying rule of the common law that an estate of inheritance cannot be created by deed without the employment of the word "heirs;" and in those states where this rule has not been altered by statute or modified by judicial construction, no synonym can supply the omission of this word, nor can the legal construction of the grant be affected by the intention of the parties.[1] The term "heirs," when used as above indicated, is a word of *limitation*, denoting the extent and duration of the grant. That is, it limits or describes an estate of infinite quantity, for a man may have an heir until the end of time. Where the word is qualified in some way, as where the grant is to one and the "heirs of his body," this indicates, not an absolute gift to the grantee specifically named, but rather a qualified donation to him and to certain persons who are to take as a class, and with respect to whom the term is a word of *purchase*. It will therefore be seen that the word may be either one of purchase or limitation, depending upon the manner in which it is employed.[2] A more striking illustration, perhaps, would be a grant to A for life with a limitation over to the heirs of B. Here the term heirs is strictly a word of purchase.

The word "assigns" is a further word of limitation em-

[1] Kearney v. Macomb, 16 N. J. Eq. 189; Adams v. Ross, 30 N. J. L. 505. See, also, Jackson v. Meyers, 3 Johns. (N. Y.) 388.

[2] This statement is subject to local statutory policy.

ployed in the creation of estates in fee, and frequently of estates of an inferior nature, but its use is not essential. In fact it gives to the purchaser no other privilege than that which the law itself confers upon him by virtue of his estate, to wit; the right to alien or transfer it. So too, the phrase "forever" is immaterial, being but declaratory of the law.

But while words of inheritance and limitation were once of the very essence of a deed, yet by reason of sweeping statutory provisions, generally enacted throughout the Union, they are now comparatively without value or legal effect. Though invariably inserted by careful conveyancers, such words are no longer necessary to create or convey a fee; and, as a rule, every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication.[1]

Corporations, like natural persons, may take land by every method of conveyance known to the law. Having no "heirs" it is customary to insert the term "successors" as a word of limitation, and the employment of such term has been held to create and pass a fee.[2]

Creation of Life Estates.—The authorities are not in accord with respect to the creation of life estates, nor in the construction to be placed upon the operative words of purchase or limitation employed in conveyances. The rule in Shelley's Case is frequently resorted to as an aid in construction; yet as this rule does not have a uniform operation in all of the states, and is denied in a number, it does not furnish a safe guide, and being at best but a technical rule is never allowed to control a manifest and clear intent. In most of the states special statutes have been enacted with reference to the creation of estates and the manner of their conveyance; and while these statutes preserve a general resemblance to each other and operate mainly in a uniform manner, yet slight divergencies exist among them all, and for this reason the reported cases are not always reliable as

[1] Hawkins v. Chapman, 36 Md. 83; Kirk v. Burkholtz, 3 Tenn. Ch. 425; Lehndorf v. Cope, 122 Ill. 317.

[2] Storrs Agricultural School v. Whitney, 54 Conn. 342.

rules unless the particular statute to which they refer or which controls their inclination is also known and understood.

By the rule of the common law a grant to one with no words of limitation, that is no words of inheritance, has the effect of raising a life estate in the grantee, but in most of the states this rule has been changed by statute and now, in the absence of an express limitation for life, the question is largely one of intention and judicial construction. The proper course is to expressly limit the estate and this may be accomplished by a grant to one "for and during the term of his life." Where the grant is to two or more and it is intended that the estate shall cease on the death of either, then the estate should be expressly limited for their *joint lives;* if it is intended that the estate shall continue to the survivor it is well so to limit it, but words of survivorship are not essential as a grant to the tenants generally for their lives would have the same effect.

The intricacies of the subject may be illustrated in the case of grants to a woman. Thus a conveyance of land directly to a woman and her children, without other words, she then having children, will vest the title in her and her children equally;[1] and it seems no title will vest at law in children thereafter born, although the instrument may declare the grantor's intent that the after-born children shall take.[2] But such children would take as beneficaries under a trust by deed,[3] or will,[4] and perhaps the living grantees under such a deed expressly providing for after-born children would hold

[1] Hickman v. Quinn, 6 Yerg. (Tenn.) 96; Loyless v. Blackshear, 43 Ga. 327; Barber v. Harris, 15 Wend. (N. Y.) 615. Such a construction is in strict accordance with the rule of the common law which provides that where a conveyance is made to two or more, with no specification of the estate or interest which each shall have, they shall share equally. See Chess-Carley Co. v. Purtell, 74 Ga. 467.

[2] Lillard v. Ruckers, 9 Yerg. (Tenn.) 64; Newsom v. Thompson, 2 Ired. (N. C.) 277. But see Barber v. Harris, 15 Wend. (N. Y.) 615.

[3] Gray v. Hayes, 7 Humph. (Tenn.) 588.

[4] Turner v. Ivie, 5 Heisk. (Tenn.) 222.

the legal title in trust for themselves and such children.[1] A very slight indication of an intention that the children shall not take jointly with the mother will suffice to give the estate to the mother for life, with remainder to the children, as well in the case of a deed[2] as of a will;[3] and even though the woman should have no children then living, or if she were unmarried, there would yet be such a contingent remainder in favor of any children she might have, that she would have no power by a conveyance before issue to defeat this contingent remainder in favor of such issue.[4] If the conveyance be expressly to the mother for life, and after her death to her children, the children born during the life estate would take, the remainder vesting as they came into being, and opening to let in those born afterward.[5] A grant to a woman with the proviso that if she never had children the land, at her decease, should go to another, has been held to constitute a life estate but subject to be enlarged to a fee upon the happening of the condition.[6]

A life estate may be raised by reservation as well as by grant. Thus, where, in a grant of the fee, the grantor reserves the use and control of the land during his lifetime, this will create in him a life estate with all its incidents.[7]

The rule in Shelley's Case.—Closely connected with the subjects we have just been considering is the topic that forms the heading to this paragraph. Among the early legal abstractions which grew out of the efforts of jurists to carry into effect the general intent of a grantor or testator by annexing particular ideas of property to particular modes of expression was the adoption of the principle that, where a conveyance is made to a person for life, remainder to his

[1] Holmes v. Jarret Moon, 7 Heisk. (Tenn.) 506; Jackson v. Sisson, 2 Johns. Cas. 321; Schumpert v. Dillard, 55 Miss. 438.

[2] Moore v. Simmons, 2 Head. 506.

[3] Bunch v. Hardy, 3 Lea (Tenn.) 543.

[4] Frazer v. Sup. of Peoria, 74 Ill. 282.

[5] Beecher v. Hicks, 12 Reporter, 123; Blair v. Vanblarcum, 71 Ill. 290.

[6] Hatfield v. Sneden, 42 Barb. (N. Y.) 622.

[7] Webster v. Webster, 33 N. H. 22.

heirs or the heirs of his body, instead of giving him a life estate and a remainder to the heirs, it vests a fee-simple or an estate-tail, as the case may be, in the first grantee. The word "heirs," in such case, is construed as a word of limitation of the estate and not a word of purchase; that is, it denotes the duration of the estate and does not indicate a class of persons who are to take as grantees.[1]

This construction is said to have been adopted in furtherence of the old feudal policy, for the purpose of saving to the lord the profits or perquisites incident to inheritance, and also upon the general ground of preventing an abeyance of the fee, which would render it inalienable during the life of the first taker. The principle was recognized from a very early period, but only became finally established in a proceeding called "Shelley's Case;" and from the notoriety which the case has received from its subsequent citation in connection with the application of the rule therein laid down, it has acquired a world-wide renown as "the rule in Shelley's Case."

This remarkable rule has been productive of an almost incredible amount of controversial disquisition, and an apparently innumerable number of decisions both in England and the United States; and, notwithstanding the fact that in this country we have no entailed estates, the rule still has a modified force, and is often resorted to as a rule of construction, particularly in cases where the questions involved turn upon the point as to whether the conveyance which forms the subject of inquiry passes only a life estate or a fee.[2]

The rule as defined by Kent.—Chancellor Kent defines the rule as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable

[1] Baker v. Scott, 62 Ill. 90.

[2] The student will find the origin and principles of this rule discussed with great learning and ability in 4 Kent Com. 215.

quality, to his heirs or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." [1]

The rule as defined by Preston.—Mr. Preston, among several definitions, gives the following: "In any instrument, if the freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee-tail; if to his heirs, a fee-simple." [2]

Analysis of the Rule.—The definition by Kent is that which is generally received as an authoritative exposition of the doctrine; and as estates-tail have been abolished in this country, the rule thus stated applies generally to all cases where there is a grant of a particular estate to the grantee with remainder over to a class of persons designated as heirs. In such cases, under the rule, the words "heirs" or "heirs of the body" are regarded as words of limitation and not of purchase,[3] and in either event the estate conveyed will be the fee.

It is true that the apparent purpose of a deed granting lands by the terms we are now considering, seems to be to create two distinct estates. That is, a life estate for the person specifically named and a remainder in fee to such persons as he should beget who might be living at his decease, or, to those persons who at his death should be his heirs. But in formulating the rule the courts proceed on the ground of the supposed intent of the grantor as manifested by the words he has employed; that is, they assume that the "heirs" are to take as heirs—by descent, and thus the general intent overcomes the apparent particular intent, for if the heirs are to take by descent then there must be an estate

[1] 4 Kent Com. 225; this statement of the rule will also be found in 1 Prest. Est. 263.

[2] 1 Prest. Est. 263.

[3] See Bradford v. Howell, 42 Ala. 422; Forrest v. Jackson, 56 N. H. 357; Smith v. Block, 29 Ohio St. 488; King v. Rea, 56 Ind. 1; Baker v. Scott, 62 Ill. 90; Fowler v. Black, 136 Ill. 375.

of inheritance in the ancestor. To create in the ancestor a descendible estate it must follow that the limitation was to *him* and his heirs, and this the rule so declares.

The effect of the rule, in nearly every case where it is applied, is to defeat the particular intention of the donor. This is conceded by the courts, but where the rule is allowed, and the case presented comes within its scope, the intent becomes immaterial, the gift over is denied effect and the entire estate vests in the first taker.[1]

In some states, notwithstanding that estates-tail as they existed under the old law have been abolished, there has yet been preserved a faint similitude and the statute has saved the entail to the first degree, thus giving a life estate to the first taker, and vesting in the second taker a remainder in fee. In those states, therefore, when the remainder is to the "heirs of the body," the estate thus conferred is in the nature of an estate-tail, to which the rule in Shelley's Case does not apply. The words of heirship and procreation, in such event, will be regarded as words of purchase and not of limitation, and the first taker will take only a life estate, while the heirs of his body will take the remainder in fee.[2]

With respect to the effect of this rule the authorities differ. In some instances it has been held that the rule is not one of construction, but an inexorable rule of law, that when the ancestor takes a preceding freehold, a remainder shall not be limited to his heirs as purchasers.[3] On the other hand, it is held that the rule, at most, is only a technical rule of construction, and must give way to the clear intention of the donor, when that intention can be ascertained from the instrument in which the words supposed to be words of limitation are used.[4] This is the view now generally taken.

It is further to be noted that the rule is only applied to those limitations in which the word "heir" is employed. Therefore, if the limitation over is to the "sons," or "chil-

[1] Griswold v. Hicks, 132 Ill. 501; Fowler v. Black, 136 Ill. 375.

[2] Butler v. Huestis, 68 Ill. 594.

[3] See Ridgeway v. Lamphear, 99 Ind. 251; Ware v. Richardson, 3 Md. 505; Cooper v. Cooper. 6 R. I. 261.

[4] Belslay v. Engel, 107 Ill. 182

dren," or even "issue," of the first taker, these terms will be construed as words of purchase, and only a life estate will vest in the first taker.

Creation of Co-tenancies.—As we have seen, land may be held in joint as well as several ownership, and this result will always follow where the conveyance is to two or more, unless excepted by the rule of equitable conversion, as in the case of partners.[1]

The statute now generally defines the character of the estate taken under a deed or devise to a number and usually fixes the same as a tenancy in common unless it is expressly provided otherwise, by proper words of limitation, in the instrument of conveyance. This is a complete reversal of the old rule of the common law, with which joint tenancy seems to have been a favorite, for by that rule no special words of limitation was necessary to create the estate while words or circumstances of negation were necessary to avoid it.[2] At present, however, when it is intended that parties shall take as joint tenants the fact must be clearly and sufficiently stated by the use of apt words. This may be accomplished beyond question by a succint statement that the estate is to be held "in joint tenancy and not in common," but usually a conveyance to several persons "jointly," without any expressions indicating that it shall be divided among them, will have the effect of vesting an estate in joint tenancy.[3] No words of limitation are necessary to create an estate in common.

Expectancies — Future estates.—As a general proposition, no estate in real property can be conveyed or released before it is acquired by the grantor. A mere expectation or belief that a party will at some future time acquire an interest in certain property is not in itself an estate or assignable interest of any kind, and cannot be conveyed by deed.[4] Hence, the conveyance by an heir apparent of his expectancy in land owned by his living ancestor, which would de-

[1] See p. 103, *ante*.

[2] See Freeman on Cotenancy, § 18.

[3] Case v. Owen, 139 Ind. 22.

[4] Lamb v. Kamm, 1 Sawyer (U. S. C. Ct.) 238.

scend to him if he survived his ancestor, and the latter should die intestate owning the same, being a conveyance of a mere naked possibility not coupled with an interest, would pass no estate or interest in the land. Such a title would not operate to defeat the grantor's own title afterwards acquired by descent, except by way of estoppel; and if the conveyance contained no covenant of warranty, such grantor would not be precluded from asserting an after-acquired title.[1] But where a conveyance of this character is made with covenants of warranty, it will operate to pass the title by estoppel if the land descends to the heir.[2]

So, too, where lands are conveyed by deed of bargain and sale simply, which ordinarily operates only to transfer vested estates and interests, if it distinctly appears on the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently-acquired interest.[3]

Where the grantor actually possesses a full estate in land, he may, as a rule, carve out of it any estate to commence in the future. At common law an attempt to create or convey a freehold or estate of inheritance *in futuro* was a nullity, the nearest approach being a covenant to stand seized to uses, and this was only permissible when the consideration was blood or marriage;[4] but through conveyances operating by virtue of the statute of uses it has long been possible to limit an estate to commence at some future time although such conveyances, if unsupported by an intermediate estate, are very rare. In nearly every instance the object of the parties can be accomplished by either a remainder or the

[1] Hart v. Gregg, 32 Ohio St. 502; Boynton v. Hubbard, 7 Mass. 112. In this case a covenant was made by an heir to convey, on the death of his ancestor, if he should survive him, a certain undivided part of what should come to him by descent, and same was held to be void at law as well as in equity.

[2] Rosenthal v. Mayhugh, 33 Ohio St. 158; Bohon v. Bohon, 78 Ky. 408.

[3] Hannon v. Christopher, 34 N. J. Eq. 459.

[4] 2 Black. Com. 338; Jackson v. McKenny, 3 Wend. 233; Brewster v. Hardy, 22 Pick. (Mass.) 380; Spaulding v. Gregg, 4 Ga. 81.

reservation of a particular estate from a present grant; as where land is conveyed by a deed of bargain and sale, with a proviso restraining the grantee from using or occupying the granted premises during the life of the grantor.[1]

There is no legal necessity, however, for the creation of an intermediate particular estate and generally, if otherwise sufficient, a conveyance of land in fee to take effect at a future time is valid, and will vest the fee in the grantee according to the terms of the conveyance.[2]

Under the statutes now in force in a majority of the states the owner of real property may convey, in the manner prescribed, any part or portion of his estate, as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations.

5. *The Covenants.*

Generally defined and classified.—Among the clauses usually inserted in deeds there are a number of stipulations in the nature of collateral promises of the performance or non-performance of certain acts, or of agreements that a given state of things does or shall, or does not or shall not, exist, which are technically known as *covenants*.[3] When relating to title, they are inserted for the purpose of securing to the grantee the benefit of the title which the grantor professes to convey, and as an indemnity against any loss that may arise in consequence of any impairment or defect of such title. By statute the employment of certain operative words of grant are also given the force of limited covenants for certain purposes.

Covenants are said to be *implied*, as where they are

[1] See Chandler v. Chandler, 55 Cal. 267; Abbott v. Holway, Adm'r, 72 Me. 298; Shackleton v. Sebree, 86 Ill. 616; Kent v. Atlantic DeLaine Co., 8 R. I. 305; Bohon v. Bohon, 78 Ky. 408.

[2] Furgusen v. Mason, 60 Wis. 377.

[3] A covenant means simply a promise under seal.

raised by intendment of law from the use of certain words, and *express*, as where the promise or agreement is set forth in explicit language declaring the intention of the parties. Implied covenants must be consistent with, and not contrary to, the express covenants; [1] and where a deed contains both, the latter qualifies and restrains the former.[2] Covenants are also classified as *personal*, or those raised for the express benefit of the immediate grantee, and *real*, or those which "run with the land" and may be enforced by a remote grantee, though some confusion exists as to the division between them. The phraseology employed in the framing of covenants has led to a still further classification. Thus we find that some of the promises are in the present tense, that is, that something does or does not exist; again we find that some of the promises are that something shall, or shall not, be done in the future. Hence if the former class are broken at all the breach occurs at the moment they are made, while the latter class have reference to future acts. Therefore we say a covenant is *in presenti* or *in futuro*. There is another classification at common law known as *lineal* and *collateral*, but the doctrines upon which it rests have never been adopted in this country, and notwithstanding that some American writers give it a place in their books it is unknown to American law.[3]

The whole doctrine of covenants grew out of the ancient system of warranty, which originally was an implication of the feudal law binding the lord to recompense his tenant, when evicted from his feud, with another of equal value. The term "warranty," however, as it is used in connection with covenants for title in this country, has but little affinity with the ancient remedy;[4] and, while the name has been re-

[1] Gates v. Caldwell, 7 Mass. 68.

[2] Kent v. Welch, 7 Johns. (N. Y.) 258; Sumner v. Williams, 8 Mass. 201.

[3] See 3 Wash. Real Prop. 480; Burton Real Prop. 255.

[4] The general doctrine of warranty is very ancient and seems to have been one of the most primitive of the rules of early Teutonic law. If a person had been wrongfully deprived of a chattel — a slave, or a horse — and found it in the possession of another he might reclaim it. If the person having the chattel in his possession had

tained, the present prevailing doctrine seems to be essentially American both in principle and practice. Indeed, it does not seem that the general covenant of warranty employed in this country ever had a place in English conveyancing. [1]

The general use of covenants for title seems to have come into vogue somewhere towards the close of the seventeenth century, superseding the ancient feudal warranty; yet, just how they came to be introduced, or how they originated, are matters which legal historians are unable to determine, and the accounts which have come down to us amount to little or nothing more than mere conjectures.[2] The early covenants were expressed in short and simple forms; and it was not until about the time of the restoration of Charles II. that they commenced to assume the form by which they have since been known.

The covenants of a deed add nothing to its efficiency as a means of conveyance.

With respect to the parties affected by the covenants the person making same or assuming the obligations which they import is called the *covenantor;* the person for whom they are made, or who may enforce the obligations, is called the *covenantee.* The grantor of a deed is usually the covenantor as well but very frequently a deed contains covenants on the part of the grantee with respect to which he becomes a covenantor to his grantor.

bought it from a third person, he could call upon such person to defend the title and if a superior title was established then to make recompense for the loss. This was known as "vouching to warranty." The person vouched to warranty might in turn vouch a second person. If at the time of claim the vouchee was dead the possessor of the article in dispute could "vouch the tomb" of the vendor and follow his property for the purpose of attaining recompense. The rule was carried to England by the Teutonic invaders and in the development of English law came to be applied mainly to the obligation on the part of a donor of land, and his heirs, to defend the estate of the donee. See Digby Hist. Law of Real Prop. 81.

[1] See Rawle, Covts. § 13; Jones v. Franklyn, 30 Ark. 631.

[2] The student is referred to Mr. Rawle's excellent treatise on Covenants for Title for a full and authoritative exposition of this subject.

Creation of Covenants.—It is fundamental that no particular form of expression or arrangement of words is necessary to create or raise covenants,[1] and that any language showing intention and manifesting a promise is sufficient for the purpose.[2] The artificial rules of conveyancing have prescribed forms, and the law has given specific and well-defined meanings to certain words employed therein; but the liberal construction always accorded to stipulations of this character permits the obvious intention of the parties to have effect regardless of form or phraseology.[3]

Implied covenants, or, as they are sometimes called, *covenants in law*, are raised in some instances by the employment of certain words having known legal operation in the the creation of an estate. These words, besides their efficacy in granting the estate, are by law given a secondary force, as it were, constituting an agreement on the part of the grantor to protect and preserve the estate so by those words already created. In their origin they are distinctly traceable to the feudal constitutions, and grow out of the reciprocal relations of the feudal lord and his tenant. The covenant or promise was raised from the words of grant, the fact of feoffment carrying with it the correlative duty of protection, and this principle has been retained and forms the basis upon which implied covenants rest wherever they are permitted to obtain.

The modern tendency has been to limit and restrict the operation of covenants implied from the use of words of grant. In many states they have been expressly abrogated by statute, and in other states derive their main efficacy from statutory authorization. In the states which still recognize implied covenants, the employment in a deed of the words "grant, bargain and sell," as the equivalent of the ancient expression "*dedi*, *concessi*, *demisi*," etc., will raise

[1] Jackson v. Swart, 20 Johns. (N. Y.) 85; Bull v. Follett, 5 Cow. (N. Y.) 170.

[2] Taylor v. Preston, 79 Pa. St. 436; Hallett v. Wylie, 3 Johns. (N. Y.) 44.

[3] Johnson v. Hollensworth, 48 Mich. 140; Wadington v. Hill, 18 Miss. 560.

common-law covenants unless limited by express words contained in such deed.[1] The words "give" and "grant" at common-law implied covenants.

But while these words are permitted to exert a certain efficacy in the absence of other and more direct expressions, yet their employment will not create covenants against the manifest intention of the parties. The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants, and the use of any language from which it appears that the parties intended that these words should not have such an effect will destroy the force of the implied covenant.[2]

Statutory Deeds.— An attempt has been made in many states to simplify the forms of conveyancing by statutory enactments prescribing a model or precedent for the ordinary deeds in common use and declaring its effect. These forms are entirely without *habendum*, and the force and effect of the covenants, when the deed is intended to carry covenants, has been transferred to and merged in the operative words of grant. These words are usually "convey and warrant," and in legal effect the deed is held to contain the five covenants ordinarily employed in common-law forms. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part equally as though written therein.[3]

Construction of Covenants.— As a general rule, covenants are to be construed according to their spirit and intent;[4] they should be considered in connection with the con-

[1] This matter is now wholly statutory and varies with locality. Usually the covenants of an indefeasible estate; freedom from incumbrances and quiet enjoyment, are raised by the statutory words of grant.

[2] Finley v. Steele, 23 Ill. 56; Stewart v. Anderson, 10 Ala. 504; Winston v. Vaughn, 22 Ark. 72.

[3] Carver v. Louthain, 38 Ind. 530.

[4] Ludlow v. McCrea, 1 Wend. (N. Y.) 328; Schoenberger v. Hoy, 40 P. St. 132.

text, and must be performed according to the intention of the parties as ascertained from both.[1] General covenants may be restricted by special covenants;[2] but usually all of the covenants are to be construed, as nearly as possible, according to the obvious intention of the parties, which must be gathered from the whole instrument interpreted according to the reasonable sense of words.[3] In case of doubt they should be construed most strongly against the covenantor and in favor of the covenantee;[4] but this is permitted only as a last resort, and when the clause is equally open to two or more inconsistent interpretations. As a further aid to interpretation, where the meaning is doubtful, the circumstances surrounding the parties at the time the covenants were made may be considered.

Common Covenants.— While covenants may be entered into for any matter connected with the estate conveyed and will be governed by the general principles heretofore shown, yet there are a number of ordinary and usual covenants which accompany nearly every conveyance which purports to be with covenants; these we may, with propriety, call the *common covenants.* They are five in number and are usually short and simple.

The first, in the order in which they usually appear, is called the covenant of *seizin.* This, in effect, is a statement that the grantor is well seized of the premises conveyed as of a sure, perfect and indefeasible estate of inheritance in fee-simple, or of such other estate as may form the subject of the grant; and, notwithstanding that in a few states this is regarded as a covenant for possession only, the general American doctrine makes it a covenant for title,

[1] Marvin v. Stone, 2 Cow. (N. Y.) 781; Wadington v. Hill, 18 Miss. 560.

[2] Whallon v. Kauffman, 19 Johns. (N. Y.) 97.

[3] Wadington v. Hill, 18 Miss. 560; Schoenberger v. Hoy, 40 Pa. St. 132; Marvin v. Stone, 2 Cow. (N. Y.) 781.

[4] Randel v. Canal Co., 1 Harr. (Del.) 154.

which is broken as soon as made if the grantor at the time of conveyance has no title.[1]

The second covenant is a like statement that the grantor has a *good right to convey* the premises granted. Like the preceding, it is a covenant for title, and broken, if at all, immediately upon the execution of the deed.[2]

The third covenant is that the lands are free from all *incumbrances*. This covenant embraces every right to and interest in the lands conveyed, diminishing the value of the estate, but not inconsistent with the transfer of the fee. It is not a mere covenant to indemnify, though often described as such, but an engagement that the grantor's title is not incumbered, and is broken, if at all, at the instant of its creation.[3] The covenant protects the grantee against every adverse right or interest of every kind, whether he had notice of such adverse right or interest or not.[4] It includes not only corporeal but incorporeal interests as well and is broken by an existing easement or any right or privilege which confers upon another any profit, benefit, dominion or lawful use in, out of, or from, the estate granted. To this rule there is an exception in some of the states in the case of a highway or public road,[5] particularly if the existence of the road over the land is known to the purchaser at the time the grant is made.[6]

The fourth covenant is that for *quiet enjoyment* of the lands conveyed. It is prospective in its operation, and goes only to the possession, not to the title. It is broken only by an eviction from or some actual disturbance in the possession of the property.[7] In this respect it differs from the covenant

[1] Pote v. Mitchell, 23 Ark. 590; King v. Gilson, 32 Ill. 348; Stewart v. Drake, 9 N. J. L. 139; Camp v. Douglass, 10 Iowa, 586; Mitchell v. Hazen, 4 Conn. 497.

[2] Bickford v. Page, 2 Mass. 455; Richardson v. Dorr, 5 Vt. 20; Scantlin v. Allison, 12 Kan. 85.

[3] Chapman v. Kimball, 7 Neb. 399; Eaton v. Lyman, 30 Wis. 41; Andrews v. Davison, 17 N. H. 413

[4] Huyck v. Andrews, 113 N. Y. 81.

[5] Whitbeck v. Cook, 15 Johns. (N. Y.) 483; but see, contra, Beach v. Miller, 51 Ill. 52; Kellogg v. Malin, 50 Mo. 496.

[6] Desvergers v. Willis, 56 Ga. 515.

[7] Hayes v. Ferguson, 15 Lea (Tenn.) 1; McGary v. Hastings, 39 Cal. 360; Boothby v. Hathaway 20 Me. 251.

of seizin, although as a general rule, the measure of damages for a breach thereof is the same.

The fifth is the covenant of *general warranty*, the most comprehensive, as well as important, of all the ordinary covenants contained in a deed. It is a covenant for title, is prospective in character, and is broken only by an eviction, or something equivalent thereto, or a disturbance of the peaceful enjoyment of the grantee.[1] The true meaning of the covenant of general warranty is that the grantee, his heirs and assigns, shall not be deprived of possession by force of a superior title, and in effect it is the same as that for quiet enjoyment, extending both to the possession and the title. Hence, any disturbance of the free and uninterrupted use of the land, though without actual expulsion therefrom, is in law an eviction and a breach of the covenant.[2]

In addition to the familiar covenants above alluded to there are others that occasionally find expression. The chief of these less known covenants is that for *further assurance*, which relates both to the title of the grantor and to the instrument of conveyance, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter. It is less extensively used in the United States than any of the other covenants for title. The covenant is practically an undertaking on the part of the grantor to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require.[3]

Covenants running with the land.—A covenant *runs with the land* when either the liability for its performance or the right to enforce it passes to the assignee of the land itself;[4] but in order that a covenant may run with the land,

[1] Scott v. Kirkendall, 88 Ill. 495; Park v. Bates, 12 Vt. 381; Post v. Campau, 42 Mich. 90.

[2] Rindskopf v. Loan Co., 58 Barb. (N. Y.) 36; King v. Kerr, 5 Ohio, 154; Burrage v. Smith, 16 Pick. (Mass.) 56.

[3] See Armstrong v. Darby, 26 Mo. 517; Miller v. Parsons 9 Johns. (N. Y.) 336.

[4] Dorsey v. Railroad Co., 58 Ill. 65; Brown v. Staples, 28 Me. 497; Clarke v. Swift, 3 Met. (Mass.) 390.

its performance or non-performance must affect the nature, quality or value of the property demised independently of collateral circumstances,[1] or it must affect the mode of enjoyment, and in all cases there must be a privity between the contracting parties.[2]

As a rule, all covenants which relate to and are for its benefit run with the land and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment.[3] Where, however, the covenant relates to matters collateral to the land, its obligation will be confined strictly to the original parties to the agreement.[4] So, too, there is a wide difference between the transfer of the burden of a covenant running with the land and of the benefit of the covenant; or, in other words, of the liability to fulfill the covenant and of the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenanter, unless the relation of privity of estate or tenure exists or is created between the covenantor or covenantee at the time when the covenant was made.[5] This naturally follows from the principle that the obligation of all contracts is ordinarily limited to those by whom they were made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate.

Where a covenant is not of such a nature that the law will permit it to be attached to an estate as a covenant running with the land, it cannot be made such by an agreement of the parties.[6]

It is a further rule that covenants will run with incorporeal as well as with corporeal hereditaments.[7]

[1] Norman v. Wells, 17 Wend. (N. Y.) 136.

[2] Wiggins v. Railway Co., 94 Ill. 83; Norcross v. James, 140 Mass. 188.

[3] Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Bronson v. Coffin, 108 Mass. 175.

[4] Gibson v. Holden, 115 Ill. 199; Parish v. Whitney, 3 Gray (Mass.) 516.

[5] See Cole v. Hughes, 54 N. Y. 444; Wells v. Nichols, 17 Pick. (Mass.) 543.

[6] Gibson v. Holden, 115 Ill. 199.

[7] Fitch v. Johnson, 104 Ill. 111; Van Rensselaer v. Read, 26 N. Y. 558; Hazlett v. Sinclair, 76 Ind.

The covenant of warranty is always held to be prospective, and to be unbroken until eviction. This covenant, therefore, always runs with the land for the benefit of any and all successive grantees;[1] and this too, notwithstanding the grantor had neither title nor possession.[2] The same is true of the covenant for quiet enjoyment; and while covenants for sezin and against incumbrances are generally held to be *in presenti*, and hence become mere rights of action enforceable only by the original covenantee,[3] yet in some states it has been held that they too run with the land so far as to permit an action to the particular successive grantee on whom the damages occasioned by their breach actually falls.[4]

In estates not of inheritance, or less than the fee, all covenants which come within the general rules, first mentioned are deemed to run with the land. Thus, a covenant to repair is regarded as a continuing covenant.[5]

6. *The Conditions.*

Generally considered.—Probably the most familiar and widely employed method of imposing burdens on a grantee, or of subjecting the estate conveyed to some particular restriction or limitation, or of confining the enjoyment of the granted premises to some specific form of use, is by the insertion in the deed of a recital technically known as a *condition*, the effect of which, in case of breach, may be to modify or defeat the grant with which it is connected.

The general nature, legal effect and classification of conditions has been shown in a former part of this work,[6] and need not here be repeated.

As a rule, any condition which is *repugnant* to the estate

448; but see Mitchell v. Warner, 5 Conn. 497; Wheelock v. Thayer, 16 Pick. (Mass.) 68.

[1] Chase v. Weston, 12 N. H. 413; Flaniken v. Neal, 67 Tex. 629; Montgomery v. Reed, 69 Me. 510.

[2] Tillotson v. Prichard, 60 Vt. 94.

[3] Blondeau v. Sheriden, 81 Mo. 545; Davenport v. Davenport, 52 Mich. 587; Real v. Hollister, 20 Neb. 112.

[4] See Allen v. Kennedy, 91 Mo. 324; Cole v. Kimball, 52 Vt. 639.

[5] Demarest v. Willard, 8 Cow. (N. Y.) 206.

[6] See p. 111, *supra*.

granted will be invalid, but it has been held that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate; such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or restrict its enjoyment with respect to particular uses, are not subversive of the estate. They do not destroy or limit its alienable or inheritable character, and the reports are full of cases where conditions imposing restrictions upon uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, saloons, distilleries, livery-stables, tanneries and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors or disturbing noises, have become desirable as places for residences of families.[1] That such a purpose is a legitimate one, and may be carried out consistently with the rules of law, by reasonable and proper covenants, conditions or restrictions, cannot be doubted.

Conditions restricting the use of the premises conveyed are usually conditions subsequent, and often provide for a reversion of the title upon their breach, and upon which the grantor may recover in ejectment.[2] Inasmuch as estates upon condition working forfeiture are odious,[3] the courts have generally laid hold of any plausible feature to sustain them. Such conditions are not favored, and must be construed strictly,[4] and will under no circumstances be enforced further than may be absolutely required; and so

[1] Cowell v. Colorado Springs Co., 100 U. S. 55; Plumb v. Tubbs, 41 N. Y. 442; Collins v. Marcy, 25 Conn. 242; Sperry v. Pound, 5 Ohio, 189; Gray v. Blanchard, 8 Pick. (Mass.) 284; Clark v. Martin, 94 Pa. St. 289.

[2] Plumb v. Tubbs, 41 N. Y. 442.

[3] Warner v. Bennett, 31 Conn. 478; Palmer v. Ford, 70 Ill. 369; Craig v. Wells, 11 N. Y. 315.

[4] Gadberry v. Sheppard, 27 Miss. 203; Bradstreet v. Clark, 21 Pick. 389; Hoyt v. Kimball, 49 N. H. 327; 4 Kent Com. 130; Woodworth v. Paine, 74 N. Y. 196.

strong is this principle engrafted in the law, that courts of equity will seldom lend their aid to divest an estate for breach of a condition.[1]

Creation of conditions.— By long and almost immemorial usage, and the repeated adjudications of courts, a condition may be raised by the employment of the term itself, the usual formula being: "Provided always, and this deed is upon the express condition."[2] These terms, "provided always," "upon the express condition," etc., have frequently been held to create an estate upon condition,[3] unless the context, or something in other parts of the deed, tends to negative this idea. So, also, the words, "if," "if it shall so happen," or other equivalent expressions, when relating to matters depending on contingencies, have been taken and held to operate in the same manner. These expressions are given as examples by the elementary writers,[4] and are also in common use.[5]

The language employed, however, except as it may tend to disclose intention, is comparatively of little moment; for the intention of the parties, when apparent, will always control technical terms,[6] and when it is clear that technical words have been used to express ideas different from their technical signification, courts are ever inclined to construe them according to such intent.[7]

The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense

[1] Warner v. Bennett, 31 Conn. 478; Insurance Co. v. Walsh, 54 Ill. 164; Palmer v. Ford, 70 Ill. 369; Wing v. Railey, 14 Mich. 83; Smith v. Jewett, 40 N. H. 530.

[2] See 4 Kent Com. 122; 2 Wash. Real Prop. 3.

[3] Sometimes called a base or qualified fee.

[4] See 4 Kent Com. 122; 2 Wash. Real Prop. 3.

[5] Hammond v. Railway Co., 15 S. C. 10; Sohier v. Church, 109 Mass. 1; Hooper v. Cummings, 45 Me. 359.

[6] Collins v. Lavalle, 44 Vt. 230; Krantz v. McKnight, 51 Pa. St. 232; Saunders v. Hanes, 44 N. Y. 253.

[7] Railroad Co. v. Beal, 47 Cal. 151; Churchill v. Reamer, 8 Bush (Ky.) 256.

unless there is a plain intent to the contrary;[1] while the addition of a clause of re-entry or forfeiture unmistakably discloses the nature of the recital.[2]

The tendency of modern times is to relax the stricter rules which raise and govern conditions, and to construe recitals which limit or restrict the use of property as covenants rather than conditions. Covenants, like conditions, do not depend upon precise or technical words;[3] and whatever shows the intent of the parties to bind themselves to the performance of a stipulation may be deemed a covenant without regard to the form of expression.[4] A covenant or condition may be created by the same words.[5] Hence, while if a condition is plainly manifest it must prevail, yet, if it be doubtful whether a clause imports a covenant or a condition, or if the language employed is not in form either a covenant or condition, the effect accorded will be that of a covenant and not a condition.[6]

Operation and effect.—A covenant, condition or stipulation inserted in a deed delivered to and accepted by the grantee will bind him to a due observance of the covenant or performance of the condition whenever same directly relates to the land embraced in the conveyance,[7] or is connected with such lands and those immediately adjoining.[8]

The grantor may impose a restriction, in the nature of a servitude, upon the land which he sells for the benefit of the land, which he retains; and, if that servitude is imposed on the heirs and assigns of the grantee and in favor of the heirs

[1] Butler v. Huestis, 68 Ill. 594; Francis Estate, 75 Pa. St. 220.

[2] Emerson v. Simpson, 43 N. H. 475.

[3] See Newcomb v. Presbrey, 8 Met. (Mass.) 406; Davis v. Leyman, 6 Conn. 252.

[4] Taylor v. Preston, 79 Pa. St. 436; Hallet v. Wylie, 3 Johns. (N. Y.) 44.

[5] Chapin v. Harris; 8 Allen (Mass.) 594.

[6] See Gallagher v. Herbert, 117 Ill. 160; Hoyt v. Kimball, 49 N. H. 322; Thornton v. Trammell, 39 Ga. 202.

[7] Kimpton v. Walker, 9 Vt. 191; Clark v. Martin, 49 Pa. St. 289; Stines v. Dorman, 25 Ohio St. 580.

[8] Burbank v. Pillsbury, 48 N. H. 475; Bronson v. Coffin, 108 Mass. 175; Hazlett v. Sinclair, 76 Ind. 488.

and assigns of the grantor, it will be binding upon and may be enforced against any subsequent purchaser of the property with notice.[1]

So, also, the grantor may impose a servitude or condition upon the land which he retains and in favor of the land he sells, but the principle is the same; and when an owner subjects his lands to any servitude and transmits them to others charged with the same, any one taking title to such lands, with notice of the conditions or restrictions affecting their use or the method of their enjoyment, takes subject to the burdens thus imposed, and, as standing in the place of his grantor, is bound to do or forbear from doing whatever his grantor should do or should not do.[2]

Conditions in Restraint of Alienation.—By the iron rule of the feudal law the grantee of a feud possessed no power of alienation, and upon his death the land reverted to his superior lord. This rigorous rule in time became modified so as to permit an inheritance by the grantee's heirs, but coupled with the right of reversion on the extinction of his blood; and as there always remained in the grantor a possibility of a reverter, this was considered such an interest in the land as entitled him to restrict the power of alienation. And so the law remained until the enactment of what is known as the statute *quia emptores*.[3] This cut off the possibility of reverter by giving to every freeman the right to sell his lands at his own pleasure, so that his feoffee should hold them of the chief lord by the same service and customs as the feoffor held them before. The possibility of reverter having thus been destroyed, the grantor's interest in the land ceased and he was no longer able to prohibit the right of alienation.

Since the enactment of the statute *quia emptores*, therefore, no conditions or restrictions in a conveyance of the fee which prohibit the alienation of land have been allowed to

[1] Whitney v. Railroad Co., 11 Gray (Mass.) 359; Clark v. Martin, 49 Pa. St. 289.

[2] Trustees v. Lynch, 70 N. Y. 440.

[3] Enacted in 1290, 18 Edw. I., ch. 1.

have any effect, and, being repugnant to the estate granted, are considered void upon that ground alone.[1] This principle is well established in the jurisprudence of every American state, and has on several occasions been re-affirmed by the supreme court of the United States.

It has frequently been held, particularly where the deed is one of gift, that a partial restraint — that is, a restraint against alienation for a limited time, or to certain persons — may be permitted,[2] though upon this point the authorities are not agreed, some cases strenuously insisting that the power of disposal cannot be arrested for a single day.[3]

Conditions in restraint of use.—As previously remarked conditions restraining the use of the property granted, if reasonable in their character and not opposed to any rule of law, may be imposed and will be enforced, whether they assume the form of either a condition or a covenant. These restrictions may relate to light, air, prospect, or an infinite variety of other subjects, and will have the effect, as a rule, of creating easements and servitudes according as the lands concerned are benefited or burdened.

Where the restriction upon the use of the land sold is intended for the benefit of land retained, a negative easement is thereby created, which will bind all successive owners of the servient estate.[4] Not infrequently these easements and servitudes are mutual; as where land is laid out and platted with building lines, and deeds are made reciting the restriction. In such case every lot may be impressed with a negative easement for the benefit of the adjacent lots.

[1] For a very elaborate and exhaustive discussion of this question, see Mandlebaum v. McDonnell, 29 Mich. 78. The same subject is very fully considered in DePeyster v. Michael, 6 N. Y. 467. See, also, McCullough v Gilmore, 11 Pa. St. 370; Bank v. Davis, 21 Pick. (Mass.) 42; McCleary v. Ellis, 54 Ia. 311.

[2] Cowell v. Springs Co., 100 U. S. 55; Hunt v. Wright, 47 N. H. 396, Langdon v. Ingram's Guardian, 28 Ind. 340.

[3] Mandlebaum v. McDonnell, 29 Mich. 78; Oxley v. Lane, 35 N. Y. 347; Anderson v. Cary, 36 Ohio St. 506.

[4] Jeffries v. Jeffries, 117 Mass. 185; Clark v. Martin, 49 Pa. St. 289; Gilbert v. Peteler, 38 N. Y. 165.

7. *Signing.*

Generally considered.— Having examined the principal incidents which have reference to the form and arrangement of the body of a deed we now come to an important group which finds mention in the *testimonium* or final clause.

The instrument, to obtain legal effect, must be *signed* by the grantor, must usually be *sealed* with his seal, and finally must be *delivered* to the grantee; these acts collectively constitute what is known as the *execution* of the deed. In addition thereto it is necessary in some states that the execution be witnessed by persons who shall append their names in testimony of the facts, this further ceremony being known as *attestation.*

While all of the different acts of execution are to a greater or less extent necessary to the validity of a deed, yet it derives its main efficacy from the signature; for an unsigned instrument, though duly attested, acknowledged and delivered, is a nullity.[1]

By the old rules of the common law a signature was not considered necessary to the validity of a deed, the seal being sufficient to show assent and prove execution. This was doubtless occasioned by reason of the very general inability of the mass of the people to read and write,[2] and the importance which was formerly attached to seals as the signets of their owners. It would seem, however, that under the Saxon rule signing was in general use provided the parties were able to write, and whether they could write or not it was customary to affix the sign of the cross; but after the Norman conquest waxen seals, usually with some specific device, were introduced and took the place of the Saxon method of writing the name and making the sign of the cross.

By the statute of 29 Charles II., for the prevention of frauds and perjuries, all transfers of land were required to be put in writing and signed by the parties making same,

[1] Goodman v. Randall, 44 Conn. 325; Jones v. Gurlie, 61 Miss. 423.

[2] See 1 Reeves' Hist. Eng. Law, 184.

and this statute is the foundation of the American laws upon the same topic.[1]

Method of signing.— While the law is strenuous in its demand that the deed of a grantor must be attested by his signature it is equally lenient as to the method by which such signature shall be appended. Thus, the deed may be signed by the grantor himself or by some other person acting for him. In the latter event, the person assuming to act must, of course, have a proper authorization so to do; and this authority, usually called a power of attorney, must be of a character equal in dignity to the instrument to which the principal's name is appended. In case of a deed, being an instrument under seal, the authorization must itself be under seal.[2]

To the rule last stated an important exception has been made in many states, by which, if the name of the grantor is affixed by some other person, at his request and in his presence, such signing is made as effectual for all intents and purposes as though it had been the grantor's personal act.[3] A still further exception has been made in some states, where a signature, though subscribed by another hand and in the absence of the grantor, is nevertheless subsequently recognized by him and adopted as his own.[4]

As the true meaning of a signature is to evidence the disposing purpose of the grantor, it follows that any act of his

[1] In Blackstone's time, signing does not appear to have been essential to validity, although he says (1 Com. 305) "It is said to be requisite that the party whose deed it is should seal, and now in most cases, I apprehend, should sign it also."

[2] Fire Ins. Co. v. Doll, 35 Md. 89; Watson v. Sherman, 84 Ill. 263; Videau v. Griffin, 21 Cal. 389.

[3] Gardner v. Gardner, 5 Cush. (Mass.) 483; Frost v. Deering, 21 Me. 156; Goodell v. Bates, 14 R. I. 65; Jansen v. Cahill, 22 Cal. 563; Conlan v. Grace, 36 Minn. 276. In order that the manual act of signing may be, to some extent at least, the physical act of the parties, it is customary to require them to touch or hold the top of the pen, and when this is done the proposition of the text receives an additional force. See Harris v. Harris, 59 Cal. 620.

[4] Greenfield Bank v. Crafts, 4 Allen (Mass.) 447.

plainly evincing intention will be binding upon him; and while his name, appended by his own hand is the highest and best evidence of such intention, yet any other unequivocal act done or directed by him may be equally effective. Hence it is that a person physically unable, or too illiterate, to write his name may sign by an arbitrary symbol — a cross, a crooked line, or any other device intended by him as a sign-manual — technically known as a mark; and the adoption of such mark or device, if the deed is in other respects regular, will be as effective to transfer the estate as if his name had been written thereon in full by himself.[1]

In the event just considered the grantor's mark may be made by himself or by merely touching the pen in the hands of another.[2] It is customary and proper to write the words "his mark" over or near the device adopted by the marksman, yet this is not essential; it is sufficient in every case if it appears that he in fact made the mark or adopted it.[3]

Of deeds interpartes.— It will be remembered that the old form of indenture contemplated mutual execution by the parties, but while the form is still preserved and it is still customary in such deeds to insert mutual covenants and conditions, yet signing by the grantee is no longer necessary to secure the enforcement of the covenants or observance of the conditions on his part. The rule now is that if a grantee accepts a deed and goes into possession under it, he is bound by the conditions contained therein as effectually as if he had signed and sealed the instrument. His acceptance amounts to an express undertaking to perform whatever duties the deed imposes.[4]

If a deed contains mutual releases or conveyances, or creates contractual relations that directly concerns the land or implicates the title, then it should be signed by all parties.

[1] Truman v. Love, 14 Ohio St. 144; Life Ins. Co. v. Brown, 30 N. J. Eq. 193; Sellers v. Sellers, 98 N. C. 13.

[2] Harris v. Harris, 59 Cal. 620.

[3] Sellers v. Sellers, 98 N. C. 13.

[4] Hickey v. Ry. Co., 51 Ohio St. 40; Burbank v. Pillsbury, 48 N. H. 475.

8. *Sealing.*

Generally considered.—It has long been the policy of the law to give ceremony and solemnity to the execution of important documents, and it has been held that it is in furtherance of this policy that seals are required to deeds and other instruments relating to the conveyance of land.[1] It would seem, however, that this method of authentication had its origin in the ignorance of the people and is the outgrowth of the conditions of former times. The general practice of sealing was introduced and brought into use in England by the Normans, after the conquest, and thenceforward no written agreement was considered as a deed unless attested in this manner.[2]

This ancient usage has been retained in modern conveyancing, but with no very definite ideas as to its character or import; the world has outgrown the necessities of an age when men affixed their seals because they could not write, and what then, from necessity, attested the genuineness of the act of execution has now become a mere arbitrary form, preserved mainly as a technical requirement in support of the long-established distinction between writings "under seal" and those which are not. A seal does not in any way affect the substance of the instrument, or add to, or detract from, the obligation which it purports, and in a number of states its use has been discontinued. But in those states where the distinction between sealed and unsealed instruments has been preserved, while the law has become relaxed in favor of custom and convenience in doing business, yet this relaxation is confined to the manner of making the seal only. In such jurisdictions sealing is still the criterion of a specialty, and the particular act which imparts special character to a conveyance and makes it in fact a deed.[3] But while an unsealed deed may be ineffectual to pass title at law,

[1] See Warren v. Lynch, 5 Johns. (N. Y.) 245, for an instructive discussion of this subject by Kent, C. J.

[2] Cruise, Dig., tit. 32, ch. II.

[3] Alexander v. Polk, 39 Miss. 737; Floyd v. Ricks, 14 Ark. 286; Underwood v. Campbell, 14 N. H. 393; Taylor v. Morton, 5 Dana (Ky.) 365; McCabe v. Hunter, 7 Mo. 355.

it may still, as a rule, be established in equity, where it is evident that the grantor intended to make a valid conveyance.[1]

Method of sealing.—A seal, as defined by all the earlier commentators, is an impression upon wax, wafer or some other tenacious substance capable of being impressed.[2] The convenience of wax was its first and only recommendation; but as it is the impression and not the wax which constitutes the seal, any other adhesive substance capable of receiving an impression will answer equally well. As a matter of fact, at the present time neither wax nor wafer is in general use, as paper has been found to possess all the essential qualities of both of these articles, and to be fully as capable of being impressed by the devices now in common use.[3]

But while any impression is good as a common-law seal, the general disuse of private seals has led to the substitution of other methods to indicate the fact of sealing; and courts, conforming to the changed conditions of the people, have relaxed the ancient rules in this respect. A piece of colored paper apparently affixed as a seal, but without impression or device of any kind, has been held a sufficient sealing,[4] while in a majority of the states where seals are still required, a scrawl has, by statute, the force of a seal, whenever it appears from the body of the instrument, the scrawl itself, or the place where affixed, that such scrawl was intented for a seal.[5] Where a scrawl is allowed for a seal, the word "seal" at the end of the maker's signature, and referred to in the testimonium clause, creates a sealed instrument; the word "seal" is equivalent to a scrawl.[6] And, generally, an

[1] Beardsly v. Knight, 10 Vt. 185; Frost v. Wolf, 77 Tex. 455; Dreutzer v. Baker, 60 Wis. 180.

[2] 3 Coke, Inst. 169; Warren v. Lych, 5 Johns. (N. Y.) 245.

[3] Pillow v. Roberts, 13 How. (U. S.) 473; Carter v. Burley, 9 N. H. 558.

[4] Turner v. Field, 44 Mo. 382. This is a very instructive case on this subject and contains some very ingenious arguments.

[5] Haseltine v. Donahue, 42 Wis. 576; Hudson v. Poindexter, 42 Miss. 304; Glasscock v. Glasscock, 8 Me. 577; Cummings v. Woodruff, 5 Ark. 116.

[6] Groner v. Smith, 49 Mo. 318; Lewis v. Overby, 28 Gratt. (Va.) 627.

instrument will be treated as sealed when the intent to affix a seal is clear.[1]

9. *Attestation.*

Nature and effect.— A deed is fully executed, in the legal sense of the term, when it has been signed, sealed and delivered. No other acts were required at common law, and the deed was considered complete when this had been accomplished. Attesting witnesses were frequently employed, but only for the purpose of preserving the evidence;[2] they were not considered necessary to give validity to the conveyance,[3] and proof of the handwriting of the party was usually deemed sufficient whenever the execution of the instrument was called in question.[4]

In many of the states the common-law doctrine has been retained, and no witnesses are required, the authentication by acknowledgment serving every purpose of this nature; in others a witness, or witnesses, are necessary where the deed has never been acknowledged, or to make proof of same; while in others a peremptory mandate of the statute requires one or more witnesses to impart legal validity to the conveyance. When required at all, attestation is usually a prerequisite to registration, and any informality in this respect

[1] Burton v. Le Roy, 5 Sawyer (U. S.), 510; McCarley v. Supervisors, 58 Miss. 749; Mining Co. v. Bonanza Co., 16 Nev. 302.

[2] See 2 Black. Com. 307; Cruise, Dig., tit. 32, ch. II; Dole v. Thurlow, 12 Met. (Mass.) 157.

[3] It will be remembered that when grants were by parol it was customary to make the investiture or livery of seizen, in the presence of witnesses. In time it became customary to deliver a *brevia testata*, or a writing setting forth the tenor of the grant. To guard against the frequent disputes which these parol investitures occasioned and to remove as far as possible any uncertainty, the clerk or scrivener would register upon the deed the names of the persons who attended as witnesses in a sort of memorandum. The witnesses were not required to sign the instrument, and in most cases were unable so to do, but it seems the deed was read in their presence and hearing at the time of delivery. This was the origin of the custom of attesting witnesses.

[4] Woods, Conv. 239. And see Meuley v. Zeigler, 23 Tex. 88; Thacher v. Phinney, 7 Allen (Mass.), 149.

deprives the instrument of its legal effect as constructive notice.[1]

The usual attestation of a subscribing witness is that the deed was "signed, sealed and delivered" in his presence. It is not necessary, however that a witness should have seen the party sign or have been present at the moment of signing; and if the party acknowledges his signature to the witness and requests him to attest it, this will be deemed sufficient.[2]

A deed attested by subscribing witnesses will be presumed to have been duly witnessed;[3] and usually, if it has been acknowledged, although there appears to have been subscribing witnesses, it will not be necessary to call them in makproof of the deed.[4] In the absence of acknowledgment, however, subscribing witnesses are material, whenever the deed is called in question, for the purpose of proving execution; and in such event the testimony of the witness authenticating his own signature is usually all that is required.[5]

Whenever the grantor signs by a mark, or in any manner other than by his own hand, it is desirable for prudential reasons that his mark or signature be witnessed. In some states this is required by law, but whether so required or not it is advisable that some verification of the mark accompany the deed.

The primary object of attestation being to preserve evidence of the fact of execution, it necessarily follows that where witnesses are employed they should be competent to testify to the fact if it should be called in question. Therefore, disqualifying interest should be guarded against,[6] and while the tendency seems to be that it will be sufficient if the witness is competent at the time the attestation is to be

[1] Ross v. Worthington, 11 Minn. 441.

[2] Cruise, Dig. tit. 32 ch. II; 1 Greenl. Evid. § 569*a*.

[3] Hrouska v. Janke, 66 Wis. 252.

[4] Simmons v. Haven, 101 N. Y. 427.

[5] Russell v. Coffin, 8 Pick. (Mass.) 143.

[6] Hence a wife should not be a witness to a deed from or to her husband. The rules relative to disqualification on account of interest have been very much relaxed in all parts of the country in recent years. Consult local statutes.

proved yet the safer rule would be to select those who are competent at time of execution.[1]

10. *Acknowledgment.*

Generally considered.— In the United States deeds of land are authenticated by a solemn declaration of the grantor before a magistrate, technically called an *acknowledgment.* When so made the certificate of such fact by the officer furnishes authority for the production of the instrument in evidence without other or further proof of its execution.[2]

The certificate of acknowledgment is no part of the conveyance, however; neither is it the act of either party to it;[3] and although a deed is defectively acknowledged, or even not acknowledged at all, if made by parties who are *sui juris*, it is still valid and effectual as between the parties and subsequent purchasers with actual notice, and passes title equally with one duly acknowledged and certified.[4] The certificate cannot affect the force of the instrument,[5] but is only evidence in regard to its execution, affording *prima facie* proof of facts which, in its absence, may be established by other evidence. It is, however, a prequisite for registration in a majority of the states, and a necessary incident to every conveyance designed to furnish constructive notice under the recording acts.[6]

The formality of acknowledgment has been rendered extremely simple of late years, and a substantial compliance with the statute prescribing its form and character is all that is required in an ordinary certificate.[7] Courts are al-

[1] See Bank v. Spencer, 26 Conn. 195; compare Frink v. Pond, 46 N. H. 125.

[2] This is statutory, but the text states the general statutory rule.

[3] Harrington v. Fish, 10 Mich. 415; Gray v. Ulrich, 8 Kan. 112.

[4] Stevens v. Hampton, 46 Mo. 404; Hay v. Allen, 27 Iowa, 208.

[5] Dale v. Thurlow, 12 Met. (Mass.) 157.

[6] Pringle v. Dunn, 37 Wis. 449; Bass v. Estill, 50 Miss. 300; Willard v. Cramer, 36 Iowa, 22.

[7] Russ v. Wingate, 30 Wis. 440; Calumet Co. v. Russell, 68 Ill. 426; Ogden v. Waters, 12 Kan. 282; Jacoway v. Gault, 20 Ark. 190.

ways inclined to construe clerical errors liberally;[1] and it is the policy of the law to uphold certificates whenever substance is found, and not to suffer conveyances, or proof of them, to be defeated by technical or unsubstantial objections;[2] and in construing such certificates resort may always be had to the deed or instrument to which they are appended.[3] On the other hand, nothing will ordinarily be presumed in favor of a certificate, which should state all the facts necessary to a valid official act.[4]

Requisites of acknowledgments.—The right to take and certify acknowledgments is wholly statutory, and can be exercised only by such officers as are expressly or impliedly designated. A grantee, notwithstanding he may be otherwise qualified, is not competent to take the acknowledgment of his grantor,[5] nor can a grantor take his own acknowledgment.[6]

The certificate should be signed by the certifying officer[7] —the insertion of his name in the body of the certificate is not enough;[8] and, while it has been held that a seal is not essential to a valid official act unless required by express statute,[9] yet, if the statute does prescribe this requirement, he must affix the same.[10] In some states a deed without a seal to the notary's certificate of acknowledgment is inadmissible as evidence.[11]

In every instance the certificate should show on its face

[1] Scharfenburg v. Bishop, 35 Iowa, 60; Hartshorn v. Dawson, 79 Ill. 108; Sanford v. Bulkley, 30 Conn. 344.

[2] Wills v. Atkinson, 24 Minn. 161; Kelly v. Calhoun, 95 U. S. 710.

[3] Tubbs v. Gatewood, 26 Ark. 128; Barnet v. Praskauer, 62 Ala. 486.

[4] Witmore v. Laird, 5 Biss. (C. Ct.) 160; Knight v. Smith, 1 Oreg. 276; Meddock v. Williams, 12 Ohio, 377.

[5] Beaman v. Whitney, 22 Me. 413; Wasson v. Connor, 54 Miss. 351; Groesbeck v. Seeley, 13 Mich. 329.

[6] Kimball v. Johnson, 14 Wis. 674.

[7] Carlisle v. Carlisle, 78 Ala. 542.

[8] Marston v. Brashaw, 18 Mich. 81.

[9] Harrison v. Simmons, 55 Ala. 510; Farman v. Buffam, 4 Cush. (Mass.) 260; Thompson v. Morgan, 6 Minn. 261.

[10] Little v. Dodge, 32 Ark. 453; Buell v. Irwin, 24 Mich. 145.

[11] See Meskimen v. Day, 35 Kan. 46.

that it was made at some assignable locality, and within the jurisdiction of the certifying officer.[1] This is accomplished by a note of the county and state, called the *venue*, immediately preceding the certificate proper, together with the usual "ss," or *scilicet*, which literally means, "let it be known" or "be it known that in the state of ——, at the county of——," etc. The use of the venue in legal writings cannot safely be dispensed with, for, although technical, yet it is sure and certain. The omission of venue, where there is nothing in the certificate to show where the officer who took the acknowledgment resided and acted, is generally a fatal defect.[2]

It does not appear that a date is essential,[3] even though the statutory form may provide for same.[4] The date may be supplied by resorting to the deed itself.[5]

The two indispensable elements of a certificate of acknowledgment consist of (1) the identification of the party whose act it purports to be, and (2) a statement of the fact of acknowledgment. Unless the person offering to make the acknowledgment is personally known to the certifying officer to be the real person who executed the cenveyance, or shall be proved to be such by a credible witness, such officer has no authority to take or certify same. This fact of identity must appear in the certificate, and a substantial compliance with this requisite is an indispensable element of validity.[6] So, too, the fact of acknowledgment must be stated. It must appear that the parties affirmed the execution of the instrument as their free and voluntary act. But in this, as in the former instance, form is not material, provided substance is found.[7]

[1] Montag v. Linn, 19 Ill. 399.

[2] Vance v. Schuyler, 1 Gilm. (Ill.) 160; Hardin v. Kirk, 49 Ill. 153. But see Graham v. Anderson, 42 Ill. 514.

[3] Irving v. Brownell, 11 Ill. 402; Rackleff v. Norton, 19 Me. 274.

[4] Hobson v. Kissam, 8 Ala. 357.

[5] Bradford v. Dawson, 2 Ala. 203; Kelly v. Rosenstock, 45 Md. 389.

[6] Fryer v. Rockefeller, 63 N. Y. 268; Fogarty v. Finlay, 10 Cal. 239; Grove v. Cather, 23 Ill. 634; Brinton v. Seevers, 12 Iowa, 389.

[7] See Bryan v. Ramirez, 8 Cal. 461; Short v. Conlee, 28 Ill. 219; Cabell v. Grubbs, 48 Mo. 353.

Ancient deeds.—Deeds more than thirty years old are called *ancient deeds*, and are exempt from the usual tests applied to conveyances, being admitted in evidence without proof of execution;[1] and where a deed would be evidence as an ancient deed without proof of its execution, the power under which it purports to be executed will usually be presumed.[2]

11. *Delivery.*

General principles.— To constitute a valid transfer of the title to land by grant there must be a *delivery* of the deed or instrument purporting to convey same.[3] This is regarded as the final act which consummates and confirms the conveyance, without which all other formalities are ineffectual;[4] and though a deed may be duly executed, and in all other respects perfect, yet, while remaining undelivered in the hands or under the control of the grantor, it passes no title.[5] To impart validity there must be a manifestation, either by act or declaration, of an intention on the part of the grantor to give, and a reciprocal intention on the part of the grantee to take, and it is only by the joint concurrence of these intentions that the devolution of title becomes complete.[6]

But while *acceptance* is as necessary as delivery to effect a valid devolution of title the law will raise many presumptions in favor of those who may be incapable of giving intelligent assent. Thus, a grant may be made to an infant of tender years who is without discretion to accept or refuse, and a delivery in law will be presumed from the beneficial nature of the transaction.[7] So, too, even in the case of

[1] Whitman v. Heneberry, 73 Ill. 109; Gardner v. Grannis, 57 Ga. 539.

[2] Johnson v. Shaw, 41 Tex. 428.

[3] Mitchell v. Bartlett, 51 N. Y. 447; Fisher v. Beckwith, 30 Wis. 55; Oliver v. Stone, 24 Ga. 63; Armstrong v. Stovall, 26 Miss. 275.

[4] Williams v. Baker, 71 Pa. St. 476; Borland v. Walrath, 33 Iowa, 130; Howland v. Blake, 97 U. S. 624.

[5] Byars v. Spencer, 101 Ill. 427; Egery v. Woodard, 56 Me. 45; Fisher v. Hall, 41 N. Y. 416.

[6] Cline v. Jones, 111 Ill. 563; Woodbury v. Fisher, 20 Ind. 388; Parker v. Hill, 8 Met. (Mass.) 447.

[7] Cecil v. Beaver, 28 Iowa 241; Masterson v. Cheek, 23 Ill. 72.

adults the assent of the grantee may be presumed, if beneficial to him, in the absence of circumstances showing express dissent.[1]

Delivery is said to be *absolute*, as where the deed passes from the possession of the grantor to that of the grantee, with the intention of consummating the grant; or *conditional*, as where the deed passes from the grantor but with the intention or agreement that possession shall not be complete in the grantee until the happening of a specified event.

The theory of delivery.— No small degree of the importance attached to the delivery of the deed in modern conveyancing arises from the fact that the deed has taken the place of the ancient livery of seizin of feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investure of the title to the land. This became gradually diminished in importance, until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seizin,[2] until finally any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title.[3]

Manner of delivery — Presumptions.— While delivery is essentially a solemn observance, it is by no means a formal one, and no particular act or set phrase of speech is necessary to constitute a legal transfer. A valid delivery may be effected by simply handing the deed to the grantee,[4] or to some third person for him,[5] with the intention of passing

[1] See Jackson v. Bodle, 20 Johns. (N. Y.) 187; Tibbals v. Jacobs, 31 Conn. 428; Rogers v. Carey, 47 Mo. 232.

[2] Shep. Touch. 64; Coke, Litt. 266*b*.

[3] See Church v. Gilman, 15 Wend. (N. Y.) 656; Warren v. Levitt, 11 Foster (N. H.) 340; Hatch v. Hatch, 9 Mass. 306.

[4] Bogie v. Bogie, 35 Wis. 659.

[5] Hendrichsen v. Hodgen, 67 Ill. 179; Stephens v. Rhinehart, 72 Pa. St. 434; Brown v. Brown, 66 Me. 316.

title and relinquishing all power and control over the instrument itself;[1] or it may be legally delivered without being actually handed over, provided that by declaration, or other act, it may be inferred that the grantor intended to part with the title.[2] So, too, if a deed has once been delivered, its retention by the grantor will not invalidate the same nor affect the title of the grantee.[3]

The attestation clause of the subscribing witnesses usually recites that the conveyance was "signed, sealed and delivered," etc., but this has been held not in itself sufficient to establish a delivery.[4]

The recording of a deed not only affords *prima facie* evidence of its delivery,[5] but, when properly executed and acknowledged, raises a legal presumption of that fact,[6] and, where to the grantee's advantage, of its acceptance as well;[7] and where the grantor in a deed not actually delivered causes the same to be recorded, it has been held a sufficient delivery to enable the grantee to hold the land as against the grantor and those claiming under him.[8] Generally a delivery will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of title.[9]

[1] Weber v. Christen, 121 Ill. 91.

[2] Tallman v. Cooke, 39 Iowa, 402; Walker v. Walker, 42 Ill. 311.

[3] Wallace v. Berdell, 97 N. Y. 13; Burkholder v. Cased, 47 Ind. 418; Thomas v. Groesbeck, 40 Tex. 530.

[4] Ruslin v. Shield, 11 Ga. 636. But see Howe v. Howe, 99 Mass. 88.

[5] Himes v. Keighblinger, 14 Ill. 469; Burkholder v. Cased, 47 Ind. 418; Kille v. Eye, 79 Pa. St. 15; Jackson v. Perkins, 2 Wend. 308; Lawrence v. Farley, 24 Hun (N.Y.) 293; Connard v. Colgan, 55 Iowa, 538; Moore v. Giles, 49 Conn. 570.

[6] Kille v. Eye, 79 Pa. St. 15; Alexander v. Alexander, 71 Ala. 295. But see Boyd v. Slayback, 63 Cal. 493.

[7] Metcalfe v. Brandon, 60 Miss. 685; Masterson v. Cheek, 23 Ill. 73. While the recording of a deed for land may afford *prima facie* evidence of its delivery and acceptance, this must be understood as applying to a deed simply conveying the land, and not as applying to a deed which imposes an obligation upon the grantee to assume and pay a pre-existing incumbrance on the property. Thompson v. Dearborn, 107 Ill. 87.

[8] Kerr v. Birnie 25 Ark. 225; Dale v. Lincoln, 62 Ill. 22; Palmer v. Palmer, 62 Iowa, 470.

[9] Gould v. Day, 4 Otto (U. S.), 405. Thus, where a deed had been executed and recorded without

Ordinarily a deed will be presumed to have been delivered on the day it bears date,[1] though this presumption is not conclusive.[2] It has been held that where the date of acknowledgment is subsequent to the date of the deed, there is no presumption of delivery prior to the acknowledgment.[3] The volume of authority, however, does not sustain this doctrine, and the date of execution, in the absence of other proof to the contrary, may still be taken as the true date of delivery,[4] and not the date of acknowledgement, which, as a matter of convenience, may well have been made afterward.[5] So, where a grantee dies between the dates of the deed and its acknowledgment, it will be presumed that the deed had been delivered in his lifetime.[6]

Revocation and Re-delivery.— Properly speaking, there can be no revocation of a deed which, being duly executed, has been actually or constructively delivered. By that act the title has passed beyond the grantor's control, and though he may still avail himself of the remedies which the law affords either for reformation, cancellation or recission, the power of revocation no longer exists. The fact that after delivery the deed has been returned to the grantor, and by him retained, neither negatives or disproves its previous

the knowledge of the grantee, who subsequently executed a conveyance to a third party, this recognition by both parties of the transfer of the title was held to be sufficient evidence that at the time a delivery of the deed had been made. Ibid.

[1] Deininger v. McConnel, 41 Ill. 228; Treadwell v. Reynolds, 47 Cal. 171; Harman v. Oberdorfer, 33 Grat. (Va.) 497; Raines v. Walker. 77 Va. 92.

[2] Whitman v. Henneberry, 73 Ill. 109.

[3] Fontaine v. Savings Institution, 57 Mo. 553; Brolasky v. Furey, 12 Phil. (Pa.) 428. Washburn also announces the same principle. See 3 Wash. Real Prop. (4th ed.) 286.

[4] Hardin v. Crate, 78 Ill. 553; Ellsworth v. Cent. R. R., 34 N. J. L. 93; Billings v. Stark, 15 Fla. 297; Breckenridge v. Todd, 16 Am. Dec. 83. The same doctrine is recognized and sanctioned by the English decisions under their statutes of enrollments. See, also, Shep. Touch. 72.

[5] People v. Snyder, 41 N. Y. 402; Hardin v. Osborne, 60 Ill. 93. And see Fisher v. Butcher, 19 Ohio, 406.

[6] Eaton v. Trowbridge, 38 Mich. 454.

delivery; nor will it destroy or in any way affect the title of the grantee as between the parties; [1] nor will the further fact that it has been canceled or destroyed while thus in the grantor's possession serve to divest title on the one hand or to re-invest it on the other,[2] notwithstanding such may have been the intention of the parties.[3] The mere act of destroying the evidence of title can have no effect upon the title itself, and this being vested in the grantee he will continue to hold it as against the grantor.[4]

The grantee, however, although possessing the estate, having voluntarily, and without fraud or mistake, destroyed the legal evidence of his ownership, would, in case of an unrecorded deed, be left entirely without means by which he could afterwards establish or prove his title; [5] and in such event the title, in a very restricted sense, may be said to have reverted, because the grantee is estopped to assert or prove it.[6]

There is a line of cases which seems to militate against the doctrines above set forth and to announce, to some extent, a contrary rule. The surrender of a deed, it is contended, serves to invest the grantor thereof with an equitable title or interest sufficient to preclude a recovery of the premises by the grantee[7] and where there has been a long delay in the assertion of grantees' rights such laches still further operates as a bar to any relief.[8]

Delivery in Escrow.— Where a deed is delivered to a third person, to be by him delivered to the grantee upon the

[1] Thomas v. Groesbeck, 40 Tex. 530; Hart v. Rust, 46 Tex. 556; Wallace v. Berdell, 97 N. Y. 13; Albert v. Burbank, 25 N. J. Eq. 404; Kimball v. Grey, 47 Ala. 230.

[2] Warren v. Tobey, 32 Mich. 45; Rogers v. Rogers, 53 Wis. 36; Tibeau v. Tibeau, 19 Mo. 78.

[3] Reavis v. Reavis, 50 Ala. 60; Chessman v. Whittemore, 23 Pick. (Mass.) 231. But see Sawyer v. Peters, 50 N. H. 143.

[4] Parker v. Kane, 4 Wis. 1; Hentch v. Hentch, 9 Mass. 307; Jeffers v. Philo, 35 Ohio St. 173.

[5] Parker v. Kane, 4 Wis. 1; Dukes v. Spangler, 35 Ohio St. 119.

[6] Howard v. Huffman, 3 Head (Tenn) 562; Speer v. Speer, 7 Ind, 178; Farrar v. Farrar, 4 N. H. 191.

[7] Sanford v. Finkle, 112 Ill. 146; Farrar v. Farrar, 4 N. H. 491.

[8] Hopp v. Hopp, 156 Ill. 183.

performance of specified conditions, or the happening of a certain contingency, it is said to be in *escrow*, and the person so holding the deed is called the *depositary*. But the first, or preliminary, delivery is simply a device for the greater convenience of the grantor; it has no operation in law, and the escrow takes effect as a deed only from the date of the second delivery; that is, from the date of its delivery to the grantee or some person in his behalf.[1] Prior to this event the estate, with all its incidents, remains in the grantor,[2] and in case of his death during the intervening period descends to his heirs;[3] subject, of course, to the equitable rights of the purchaser.[4] But while delivery is essential to render the deed effectual at law, it is in fact the performance of the conditions, or the happening of the contingency, that imparts life and validity;[5] and for this reason equity regards the title as vesting in the grantee whenever this occurs.

In case the grantee dies, the subsequent performance of the condition vests title in his heirs.[6] In case the grantor dies pending the second delivery the deed will still be effectual and may be delivered on performance of the condition. In such event the second delivery, through the application of the principles of relation, is given effect as of the first.[7]

Where an escrow has been improperly delivered, or obtained from the depositary by fraud, without performance of the conditions attached thereto, it conveys no title to the grantee nor innocent purchasers under him.[8] The instru-

[1] Dyson v. Bradshaw, 23 Cal. 528; Smith v. Bank, 32 Vt. 341; Peter v. Wright, 6 Ind. 183; Everts v. Agnes, 4 Wis. 343.

[2] Jackson v. Rowland, 6 Wend. (N. Y.) 666; Cogger v. Lansing, 43 N. Y. 550.

[3] Tenecick v. Flagg, 29 N. J. L. 25; Cogger v. Lansing, 43 N. Y. 550.

[4] Cogger v. Lansing, 43 N. Y. 550.

[5] Hinman v. Booth, 21 Wend. (N. Y.) 267; Groves v. Tucker, 18 Miss. 9; State Bank v. Evans, 15 N. J. L. 155.

[6] Lindley v. Graff, 37 Minn. 338.

[7] Taft v. Taft, 59 Mich. 186; Bostwick v. McEvoy, 62 Cal. 499.

[8] Evarts v. Agnes, 6 Wis. 453 and 4 Wis. 343; Jackson v. Lynn, 94 Iowa, 151; Dixon v. Bristol's Savings Bank, 102 Ga. 461. But see Blight v. Schenck, 10 Pa. St. 285; Quick v. Milligan, 108 Ind. 419.

ment indeed is not regarded as a deed because, in such case, it lacks one of the essential elements—delivery, and this depends not on physical possession or tradition but on intention. The grantor may, however, ratify such act, either expressly or by implication,[1] and the deed will then operate as a conveyance, but to render such ratification binding it must have been made with a full knowledge of all the material facts.

12. *Registration.*

General principles.—The law has always aimed at securing notoriety in the sale and conveyance of land. In the early stages this was obtained by a public delivery of possession but later years developed a more simple and convenient method. All that was formerly secured by the ancient livery of seizen is now accomplished by the insertion of an account of the transaction in a record book kept at a public office and which at all times is open for the inspection of every one interested. This is technically known as *registration.*

The system of registration practiced in the United States is unknown to the common law and is essentially a creation of statute. It is probably derived from the English statute of enrollments, which was enacted to counteract the evil effects resulting from the practice of secret conveyances under the statute of uses.[2] This statute provided that every bargain and sale of an inheritance or freehold should be by deed indented and enrolled within six lunar months from its date, either in one of the courts of Westminster, or before the justices and clerk of the peace in the county where the lands

[1] Thus his conduct may be such as to create an estoppel as to *bona fide* purchasers from the grantee, as where he has remained silent when he should have spoken. See Cotten v. Gregory, 10 Neb. 125; Reese v. Medlock, 27 Tex. 120.

[2] The practice of inscribing a copy of a private document in a public register was known to the Roman law and seems to have been originally introduced by the Emperor Leo in reference to gifts. The proceeding was called *insinuatio.* See Codex Just. b. 8. tit. 54 s. 30.

were situate.[1] The enrolling of a deed did not make it a record, but it was recorded "to be kept in memory." [2]

By the American system of registration, deeds of conveyance of any estate or interest in land, when duly recorded in conformity with the law of the state where such land is situate, have the dignity and effect of records, and to them much of the stability of our land titles is attributable. Such record not only serves as a means of preservation of the muniments and evidences of title, but also has the effect to give that notoriety to the transfer formerly obtained by livery of seizin, to which it is made equivalent in some of the states by statute.[3]

The statutes of registration bear a close similitude in all the states, and provide generally for the recording of every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity.

Effect of Recording Acts.—Registration in the United States is permitted to have an effect which was utterly unknown at common law and which is practically an American development or extension of the old doctrine of *constructive notice.*

It is a familiar provision of the recording acts that every conveyance which shall not be recorded as provided by law shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded; and further, that every instrument recorded in the manner prescribed by statute shall, from the time of filing same for record, impart notice to all persons of the contents thereof. It would seem, however, that the constructive notice afforded by the record of a deed applies only to those who are bound to search for it; as, subsequent purchasers,

[1] But this only applied to one kind of deed, viz.: a bargain and sale, and did not affect the other methods of conveyance of which there were a number.

[2] Jacobs Law Dict. 457.

[3] Higbee v. Rice, 5 Mass. 344.

and all others who deal with or on the credit of the title, in the line of which the recorded deed belongs.[1] That such record imparts notice is to be understood also in the sense that the contents of the deed are correctly spread upon the record,[2] for the recording acts cannot be made by equitable construction to embrace cases not within them, or to give constructive notice of things the records do not show; and where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts.[3] But incorrect registration cannot avail a party who is not misled thereby.[4] The registry of an instrument not required by law to be recorded is notice to no one;[5] and in the absence of statutory provisions to the contrary, a deed is not constructive notice, because copied into the registry, if it has not been duly executed, acknowledged or proved, so as to entitle it to registration,[6] though such an instrument is

[1] Maul v, Rider, 59 Pa. St. 167; Corbin v. Sullivan, 47 Ind. 356; Gillett v. Gaffney, 3 Colo. 351.

[2] Terrell v. Andrew County, 44 Mo. 309; McLouth v. Hurt, 51 Tex. 115.

[3] Frost v. Beekman, 1 Johns. Ch. 288; Barnard v. Campau, 29 Mich. 162; Wait v. Smith, 92 Ill. 385. Compare Riggs v. Boylan, 4 Biss. 445. As was said by the court in Terrell v. Andrew County, 44 Mo. 309: "A person in the examination of titles first searches the records, and if he finds nothing there he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unincumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory."

This is a vexed question; the text states the preponderating view, but in several states a contrary doctrine is held. See Marigold v. Barlow, 61 Miss. 593; Mines v. Mines, 35 Ala. 23; Throckmorton v. Price, 28 Tex. 605; Clader v. Thomas, 89 Pa. St. 343.

[4] Gaskill v. Badge, 3 Lea (Tenn.) 144.

[5] Galpin v. Abbott, 6 Mich. 17; Sigourney, v. Larned, 10 Pick. 72.

[6] Loughridge v. Bowland, 52 Miss. 546; Pringle v. Dunn, 37 Wis. 449; Blood v. Blood, 23 Pick. 80; Bishop v. Schneider, 46 Mo. 472; Parrett v. Shablut, 5 Minn. 323; Washburn v. Burnham, 63 N. Y. 132; Jones v. Roberts, 65 Me. 273.

effective as to all parties who have actual notice of its contents.[1]

Registration, in legal intendment, is conclusive notice to the parties to be affected by it. But notice of a prior unrecorded deed, communicated to a purchaser, will prevail over a subsequent recorded deed;[2] while as between the immediate parties no registration is necessary.

Loss or destruction of records.—The obligation of giving the notice required by law rests upon the party holding the title, and if his duty is imperfectly performed, he, and not an innocent purchaser, must suffer the consequences;[3] yet in a majority of the states that duty is effectively performed by filing the deed or instrument for record, and when this has been accomplished the party has done all that the law requires.[4]

Where a party has in all respects complied with the law, the total or partial loss or destruction of the record will not, it seems, impair any rights which may have accrued thereunder nor affect the constructive notice afforded by the filing or recording of the instruments, which still remain of binding force and effect upon subsequent purchasers.[5] In the event of the destruction of the record, as well as of the original instrument, an abstract, shown to have been made in the ordinary course of business and delivered to the parties interested in the land, is, as to such lost instrument, competent evidence of the facts therein recited, either by comity, or, in some states, by express enactment.[6]

[1] Bass v. Estill, 50 Miss. 300; Musick v. Barney, 49 Mo. 458; Musgrove v. Bonsor, 5 Oreg. 313. Where upon the records a defective deed is found and is seen, this must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon. Hastings v. Cutler, 25 N. H. (4 Fost.) 483.

[2] Claiborne v. Holmes, 51 Miss. 146.

[3] Terrell v. Andrew County, 44 Mo. 309.

[4] Riggs v. Boylan, 4 Biss. 445.

[5] Myers v. Buchanan, 46 Miss. 397; Gammon v. Hodges, 73 Ill. 140; Steele v. Boone, 75 Ill. 457.

[6] Russell v. Mandell, 73 Ill. 136. And see Weeks v. Downing, 30 Mich. 4.

13. *Minor Incidents.*

Generally.—While we have considered the principal incidents of deeds of conveyauce there yet remain a few other "circumstances" and "requisites" that may profitably engage our attention but which can be passed with briefer mention than the matters discussed in the preceding paragraphs. These we may gather under the one head of "minor incidents."

The date.—It is customary, and proper, in the draughting of instruments of conveyance, to mention the time of execution by inserting a statement of the day, month and year. This may be done at either the commencement or the close. Where the instrument takes the form of an indenture the statement is usually placed at the beginning; in deeds poll it is invariably placed at the end. This is known as the *date.*[1] It would seem that in former times deeds were not dated, because, as we are told, the limitation of prescription or time of legal memory often changed; and then it was held that a deed bearing date before the limited time of prescription was not pleadable.[2] But about the time of Edward II it became customary to insert a date in all deeds and since then the custom has been regularly observed.

The date is no part of the substance of a deed,[3] nor is it essential to its validity,[4] the conveyance taking effect only from delivery,[5] but as the rights of the contracting parties are not infrequently made to depend upon an accurate statement of time[6] it may become important in determining questions of priority, as well as in ascertaining whether all

[1] From the Latin *datum*, meaning given. When deeds were written in Latin the usual formula was "given this 10th day of June," etc.

[2] Cruise Dig. tit. XXXII ch. 22.

[3] Jackson v. Schoonmaker, 2 Johns. 230; Meach v. Fowler, 14 Ark. 29; Costigan v. Gould, 5 Denio, 290.

[4] Jackson v. Bard, 4 Johns. 230; Blake v. Fish, 44 Ill. 302; Thompson v. Thompson, 9 Ind. 323.

[5] Thatcher v. St. Andrew's Church, 37 Mich. 264; Whitaker v. Miller, 83 Ill. 381.

[6] Smith v. Porter, 10 Gray (Mass.) 68.

the statutory requirements at the time of its execution have been complied with.

The date of a deed, in the absence of other proof, is presumed to be the true date of its execution,[1] as well as delivery,[2] and is the time from which title in the grantee should ordinarily be computed.[3] As deeds are now drawn, the date usually forms the initial recital in the premises, though it may frequently be found in the *testimonium* clause, and in case of discrepancy the latter, should, it seems, be taken as the true date.[4]

Though the expressed date of a deed is immaterial to its operation and effect,[5] and may under ordinary circumstances be contradicted or explained,[6] yet when taken in connection with conditions or stipulations annexed to the grant, it may become important in fixing the time for the performance of any act by grantor or grantee, and in such case cannot be varied by parol.[7] Should the instrument be without date, the date of acknowledgment may be presumed to be also that of execution and delivery.[8]

The Recitals.— In the premises of many deeds there will be found a narrative of such facts as are necessary to explain the grantor's title or the motives which induced the making of the deed. The statement of these matters of inducement is termed the *recital.* It was formerly customary to insert recitals for the purpose of showing the origin or derivation of the grantor's title, or to show facts connected with or relating to the subject matter of the conveyance, but under our modern system this is now seldom done except in the case of official deeds.

Confirmatory deeds usually contain some matters of this kind, and where a deed is given to replace one which has

[1] Darst v. Bates, 51 Ill. 439; Smith v. Porter, 10 Gray, 66.

[2] Hardin v. Crate, 78 Ill. 553.

[3] Breckenridge v. Todd, 61 Am. Dec. 83.

[4] Morrison v. Caldwell, 5 T. B. Mon. (Ky.) 436.

[5] Harrison v. Trustees of Phillips Academy, 12 Mass. 456.

[6] 2 Black Com. 304.

[7] Joseph v. Bigelow, 4 Cush. (Mass.) 82.

[8] Gormon v. Stanton, 5 Mo. App. 485.

been lost a recital of the former deed is generally necessary. In the main, however, the recitals are confined to deeds executed by way of pledge (mortgages), or under a power by trustees, or by executive and ministerial officers.

The recital usually precedes the granting clause of the deed as a sort of preamble commencing with a "whereas" and ending with a "now therefore," and unless of the substance of the instrument, as in case of conveyances by the sheriff and other administrative officers, will not materially affect the conveyance even though the facts be mis-recited.

There is another class of recitals introduced in modern deeds of more importance, as a rule, than that just mentioned. These recitals are usually inserted after the habendum but may be employed in connection with the grant. They may consist of explanatory matters but usually refer to some charge, lien, or incumbrance upon the land conveyed; as that the premises are subject to the lien of a mortgage, to taxes, to rights of occupation by parties in possession, etc.

Recitals in deeds bind the parties thereto, and all persons claiming under them,[1] and a grantee is chargeable with notice of facts recited in any deed which constitutes a necessary part of his chain of title.[2] Such recitals affect only those parties among whom there is a privity, however, and hence are not evidence against one who holds under a title emanating from an independent source.[3]

Words of Grant.— The operative words of conveyance are placed in the premises of a deed and are called *words of grant*. Formerly much importance was attached to these words, each of which possessed a specific significance, and it is still a common practice for the conveyancer to insert in deeds all the operative terms used in transferring land, as "grant, bargain, sell, remise, release, alien, convey and confirm," though their presence, save where they imply covenants, is no longer necessary. This was formerly done that

[1] Fisk v. Flores, 43 Tex. 340; Lamar v. Turner, 48 Ga. 329.

[2] Pringle v. Dunn, 37 Wis. 449; Acer v. Wescott, 46 N. Y. 348; R. R. Co. v. Kennedy, 70 Ill. 350.

[3] Kerfoot v. Cronin, 105 Ill. 609; Lamar v. Turner, 48 Ga. 329.

the instrument might take effect in one way if not in another, and in such case the party receiving the deed had his election which way to take it. Thus, according to the words used, he might claim either by grant, feoffment, gift, lease, release, confirmation or surrender. The words of grant of most frequent occurrence are "grant,[1] bargain and sell," and in many of the states, when not limited by express words, they are construed as covenants;[2] while in other states such a conveyance, without more, would be a mere quitclaim and inoperative to convey an after-acquired title,[3] or warrant that conveyed.[4]

Technical words of grant possess little of their former efficacy, though it is still true that to constitute a conveyance there must be sufficient words showing an intention to grant an estate;[5] yet every part of the instrument may be resorted to for the purpose of ascertaining its true meaning and the intention of the parties,[6] and, generally, any writing that sufficiently identifies the parties, describes the land, acknowledges a sale of vendor's rights for a valuable consideration, and is signed, sealed and delivered, is a good deed of bargain and sale,[7] and, if complete in other respects, has been held to constitute a valid conveyance, even though all words of grant are omitted.[8] The better and safer way,

[1] The word "convey" is equivalent to "grant." Lambert v. Smith, 9 Oreg. 185.

[2] Brodie v. Watkins, 31 Ark. 319; Hawk v. McCullough, 21 Ill. 220. This construction is usually made under peculiar statutory provisions.

[3] Butcher v. Rogers, 60 Mo. 138; Nicholson v. Caress, 45 Ind. 479.

[4] Taggart v. Risley, 4 Oreg. 235. The word "give" was formerly held, in the absence of express covenants, to constitute a warranty during the life of the grantor. Dow v. Lewis, 4 Gray (Mass.) 468.

[5] McKinney v. Settles, 31 Mo. 541; Brewton v. Watson, 67 Ala. 121; Brown v. Manter, 21 N. H. 528.

[6] Saunders v. Hanes, 44 N. Y. 353; Callins v. Lavalle, 44 Vt. 230; American Emigrant Co. v. Clark, 62 Iowa, 182.

[7] Chiles v. Conley's Heirs, 2 Dana (Ky.) 21.

[8] Bridge v. Wellington, 1 Mass. 219. This case has been severely criticised in subsequent decisions and frequently rejected. The general rule is that the deed should contain apt words of grant, release or conveyance. See Johnson v. Bantock, 38 Ill. 111; Hammelman v. Mounts, 87 Ind. 178.

however, is to follow the forms which legal custom and long usage have prescribed, and to employ those terms which courts have judicially determined as effective for the purposes of a grant.

The habendum.—The *habendum* of a deed, though formerly, like many other technical features, of great importance, has now degenerated into a mere form,[1] and in the statutory conveyances now in use in many of the states is entirely omitted. In general the *habendum* has reference to the premises and declares what estate the grantee shall hold in the lands. It may sometimes enlarge or diminish the grant, when showing a clear intention so to do,[2] but cannot perform the office of divesting the estate already vested by the deed, and is void if repugnant thereto.[3] Thus, if the grant in the premises be to A and his heirs, *habendum* to A for life, the *habendum* is void. Where the deed purports to create a vested or contingent remainder, or conveys property in trust, the *habendum* becomes important; and where no estate is mentioned in the granting clause it becomes efficient to declare the intention and rebut any implication which would otherwise arise from the omission. In this way the habendum may qualify the premises. Thus, if the grant be to A, without more, this, at common law, would create a life estate, and under the statute would be sufficient to vest a fee, but if the *habendum*, in such case, limit an estate for years, this would control.

Supplementary words, both of grant and description are frequently inserted in the habendum, as that the grantee is to have the granted land "together with all and singular the appurtenances and privileges thereto belonging or in any wise appertaining." These words, however, are but an archaic survival, retained through the veneration men have for old forms. They have no legal effect further than to emphasize the grant or possibly to aid in the construction of some other clause. As a general rule when anything is

[1] 4 Kent Com. 468; 4 Black. Com. 298.

[2] Corbin v. Healy, 20 Pick. 514.

[3] Riggin v. Love, 72 Ill. 553; Halifax v. Stark, 243 Vt. 43; Robinson v. Payne, 58 Miss. 690.

granted all the means to attain it and all that is annexed to it, pass with the principal thing without other words.

Relinquishments and waivers.—The statutes, in many states, prescribe certain formulas with respect to the relinquishment of dower and waiver of homestead. Of course these features must be duly observed and while substantial compliance is usually all that is required, yet the better way, whenever practicable, is to employ the very language of the statute. If such recitals are prescribed both for the deed and for the acknowledgment, an omission in either may render the waiver ineffectual.[1]

Technical phrases. — Whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will generally construe it according to the manifest intention of the grantor;[2] but in ascertaining such intent, where the words employed are not technical, they must be taken in their usual acceptation.[3]

In conveyancing a large number of phrases have obtained currency, which practically neither add to nor detract from the force of that which precedes or follows, but are retained and used in much the same manner as numerous other incidents of modern deeds, rather for their suppositious efficacy than for any real utility. Of this class is the language "more or less," which is extensively used in deeds and contracts for the sale of land.[4] In like manner the words "known as," in a description in a deed, are a mere formula and have no restrictive effect.[5] "And all the buildings thereon," etc., have no legal signification.[6] So, also, many phrases in the body of the deed are without force; as, the words "to his and their

[1] See Russell v. Rumsey, 35 Ill. 362; Witler v. Biscoe, 13 Ark. 422, Stevens v. Owen, 25 Me. 94.

[2] C. P. R. R. Co. v. Beal, 47 Cal. 151.

[3] Bradshaw v. Bradshaw, 64 Mo. 334.

[4] It has been held, however, that a qualification of the quantity of a lot of land sold as "more or less" will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud. Wylly v. Gazan, 69 Ga. 506.

[5] Kneeland v. Van Valkenburgh, 46 Wis. 434.

[6] Crosby v. Parker, 4 Mass. 110.

proper use and behoof," etc., following the words of limitation. These words have no particular meaning or effect in determining either the extent of the interest conveyed, or the nature and quality of the estate intended to be vested. In deeds of bargain and sale they serve no office whatever.[1] Words and phrases similar to the foregoing detract nothing from the deed by their omission.

The intent, when apparent, and not repugnant to any rule of law, will always control technical terms; for the intent, and not the words, is the essence of every agreement.[2]

The Testimonium.—It is the almost invariable practice to conclude a deed with a *testimonium* recital; that is with a statement that the parties in witness of the grant "have hereunto set their hands and seals." The only practical legal value of the clause is that it indicates an intention to execute a sealed instrument and it may be resorted to for this purpose where the instrument is defectively executed[3] or to give character to the device which has been employed for the purpose of a seal.[4]

Reading.—Among the requisites of a valid deed, as enumerated by the old writers, is that it shall be read to the parties. This requirement had its origin in an age of general illiteracy and has now lost much of the reason which inspired it. While it has been held that the reading of the instrument is still material in the case of an illiterate person,[5] yet the better rule would seem to be that the circumstance that the deed was not read is of no weight, unless such a request had been made and denied.[6] If the deed is incorrectly read it may be avoided by the injured party,[7]

[1] Jackson v. Cary, 16 Johns, 302; Brain v. Renshaw, 12 Rep. 622.

[2] Callins v. Lavalle, 44 Vt. 230.

[3] Starkweather v. Martin, 28 Mich. 471; Hudson v. Poindexter, 42 Miss. 304.

[4] Haseltine v. Donahue, 42 Wis. 576; Glasscock v. Glasscock, 8 Mo. 577.

[5] See Suffern v. Butler, 18 N. J. Eq. 220.

[6] Withington v. Warren, 10 Met. (Mass.) 434; Committee v. Kesler, 67 N. C. 443.

[7] Jackson v. Haynor, 12 Johns. (N. Y.) 467.

and this result would seem to follow even if it be correctly read to a person who does not understand the language in which it is written.[1]

Validity — Construction. — The general construction of deeds is favorable to their validity, and although courts cannot give effect to an instrument so as to do violence to the rules of language or of law, they will yet so construe it as to bring it as near to the actual meaning of the parties as the words they have seen fit to employ and the rules of law will admit.[2] The intention of the parties, when it can be ascertained, will always control, if by law it may, and as between them the deed is always construed most strongly against the grantor.[3] When the words of a deed are so uncertain that the intention of the parties cannot be discovered, the deed is void.[4]

In the exposition of deeds, the construction must be upon the whole instrument, and with a view to give every part of it meaning and effect, and the intent when apparent, and not repugnant to any rule of law, will control technical terms.[5]

Where there is a disagreement or inconsistency between two or more clauses of a deed, it is a general rule that the earlier clause will prevail if the inconsistency be not so great as to avoid the instrument for uncertainty.[6] This rule is always applied where an estate is expressly granted, and is followed by a reservation, exception or condition which destroys the grant.[7] In the matter of description, where there is a clear repugnance, effect will always be given to that which is most definite and certain, and which will carry out the evident intention of the parties.[8]

[1] Fisher v. Meister, 24 Mich. 447.

[2] Callins v. Lavalle, 44 Vt. 230; Churchill v. Reamer, 8 Bush (Ky.), 256; Peckham v. Haddock, 36 Ill. 38; Hadden v. Shoutz, 15 Ill. 581; Jackson v. Meyers, 2 Johns. 395.

[3] City of Alton v. Transportation Co., 12 Ill. 38; Jackson v. Hudson, 3 Johns. 375.

[4] Rollin v. Pickett, 2 Hill. 522; Jackson v. Rosvelt, 13 Johns. 97; Peoria v. Darst, 101 Ill. 671.

[5] Callins v. Lavalle, 44 Vt. 230; Saunders v. Hanes, 44 N. Y. 253.

[6] Tubbs v. Gatewood, 26 Ark. 128.

[7] Cutler v. Tufts, 3 Pick. 277; Pynchon v. Sterns, 11 Met. 304.

[8] Wade v. Deray, 50 Cal. 376; Kruse v. Wilson, 79 Ill. 233.

The question of validity, in most cases, rests upon extraneous evidence. The principal facts which tend to invalidate deeds, aside from defects of form or substance, which appear from inspection, are: incapacity of the parties; inadequacy of consideration; fraud in the inception; and undue influences or duress in the procurement,—all of which must, from their several natures, be shown by evidence *aliunde*, the conveyance upon its face being regular and the formalities of law having been fully complied with.[1]

There is an important distinction between void and voidable deeds, although the terms are often used indiscriminately. A deed absolutely void passes no title, while a deed which is voidable merely may be the foundation of an unimpeachable title in the hands of a subsequent purchaser without notice.[2] The term "void" is seldom, unless in a very clear case, to be regarded as implying a complete nullity; but it is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case.[3] Statutes not infrequently declare acts void which the tenor of their provisions necessarily make voidable only. Deeds are seldom absolutely void, though they may be relatively so, and incapable of legal effect as between the parties, but in regard to the consequences to third persons the distinction is highly important.[4]

As respects subsequent purchasers without notice, the right or title conferred by a conveyance is to be determined by the instrument itself as recorded, and not by facts *in pais* or other instruments not recorded.[5] Latent ambiguities and

[1] A purchaser of land from a prior *bona fide* holder who acquired the legal title, as shown by the records, for a valuable consideration, without notice of any outstanding equity, will be protected against such equity, even though he himself had notice thereof. Peck v. Arehart, 85 Ill. 113.

[2] Crocker v. Ballangee, 6 Wis. 645.

[3] Brown v. Brown, 50 N. H. 538; Kearney v. Vaughn, 50 Mo. 284.

[4] Bromly v. Goodrich, 40 Wis. 131; Seylar v. Carson, 69 Pa. St. 81; Van Schaac v. Robbins, 36 Iowa, 201; Kearney v. Vaughn, 50 Mo. 284.

[5] Miller v. Ware, 31 Iowa, 524; Peck v. Arehart, 95 Ill. 113.

defects do not usually avoid the deed, and a deed intended to correct an error in a former deed by the same grantor will cure such defect, and take effect by relation as of the time when the erroneous deed was given, the same as if it had been reformed in equity.[1]

Alterations and erasures.—It is an old rule that a deed must be completed before delivery,[2] and that nothing afterwards added to or taken from the same will be of any effect. That the rule is a good one is apparent and it is greatly to be regretted that any infringement was ever permitted. Unfortunately, however, courts have temporized with questions arising under it until the integrity of the rule has almost been destroyed. The principal cases in derogation of the rule have arisen where deeds had been delivered with no grantee named, and such deeds, after the name had been supplied, were allowed to have effect as grants.[3]

It is a further rule, that any material alteration of a deed after delivery, whether by addition or subtraction, will avoid the same.[4] That is, if words or sentences are erased or interlined, and by such erasure or interlineation a material change is produced, the deed cannot stand as the act of the grantor. But while this statement seems to be emphatically announced in the old books, it must be taken with some qualification. As has elsewhere been shown, by the making and delivery of a deed the title to the land conveyed passes to the grantee and though he may afterwards mar, change, or even destroy the evidence of the grant this will not defeat or divest such title.[5] The rule, therefore, applies only where there is an attempt to make the altered deed a basis of action; as where a grantee seeks to enforce some of the stipulations of the deed, or to recover on the covenants thereof. Under such circumstances the alteration would be fatal to action.[6]

[1] Hutchinson v. Railroad Co., 41 Wis. 541.

[2] Shep. Touch. 541.

[3] See Van Etta v. Evanson, 28 Wis. 33; Devin v. Himer, 29 Iowa 301; Field v. Stagg, 52 Mo. 534.

[4] Morris v. Vandren, 1 Dall (U. S.) 67.

[5] Miller v. Gilleland, 19 Pa. St. 119; Jackson v. Chase, 2 Johns. (N. Y.) 84.

[6] Woods v. Hilderbrand, 46 Mo. 284.

It has been held in some states that it may be presumed, in the absence of anything to the contrary, that the alteration was made either before or contemporaneous with the signing of the instrument, but the better rule would seem to be that the law will indulge in no presumptions but imposes on the party claiming under the instrument the burden of explaining the alteration.[1]

As it is no uncommon thing in the draughting of deeds to erase and interline, prudence would suggest that in every such instance there be appended to or written upon the instrument some note or memorandum showing the time when the alteration was made. This is usually inserted just after the *testimonium* and over the signatures, and as a further precaution the draughtsman may place in the margain his own name or initials.

Forged deeds.—Any document relied upon as a muniment of title must, as a rule, be susceptible of being proved, unless it ante-dates the period of limitation, in which case, in the absence of other controlling circumstances, it may be offered under the general rules relating to ancient deeds.

A *forged deed*, having never had a legal inception, is absolutely void. It conveys no right and confers no title, nor will the recording of same affect the legal status of the parties concerned. Where the forgery is established the question of good faith is not involved, and it is immaterial that a purchaser may have entered thereunder without notice of the infirmity.[2]

Yet, where there has been an actual adverse possession, commenced without notice and in good faith, and such possession has continued uninterruptedly for the full statutory period, such a deed may be effective, not as a conveyance but as an estoppel, considered in connection with the statute of limitations.

[1] Ely v. Ely, 6 Gray (Mass.) 439; Beaman v. Russell, 20 Vt. 205.

[2] Haight v. Vallett, 89 Cal. 245; McGinn v. Tobey, 62 Mich. 252.

CHAPTER VII.

FORMS OF CONVEYANCE.

Specialized forms of conveyance—Governmental, or public—Patents—Legislative grants—Individual, or private—Conveyances derived from the Statute of Uses—Conveyances derived from the common law—Deeds—Mortgages—Powers—Leases—Fiduciary, or official conveyances—By Trustees—By Ministerial and Executive Officers.

Generally classified.—Having duly considered the general nature of deeds, together with their "requisites" and "circumstances," we may now proceed to examine the specific methods by which the transfer of estates and devolution of title is effected.

All of the various forms of deeds now in common use in this country derive their origin from the land and conveyancing system of Great Britain, and are but modifications of two species, one of which was developed by the common law, while the other was created under the operation of the statute of uses. From these two species the conveyancers evolved a number of divergent and complex forms,[1] characterized, in the main, by much ingenious subtlety and legal refinement. The tendency of modern legislation, however, as well as the current of later decisions, has been to simplify the forms of conveyance and to reduce the number of the methods, so that the technical principles relating to deeds and other writings of conveyance, of which the old books

[1] The elementary writers classify common-law deeds as follows: Five original conveyances, to wit: Feoffment, Gift, Grant, Lease, Exchange and Partition; five derivative conveyances, to wit: Release. Confirmation, Surrender, Assignment and Defeasance; and five conveyances derived from the statute of uses, to wit: Covenant to stand seized to uses; bargain and sale; lease and release; deed to lead or declare the uses of other more direct conveyances; and deeds of revocation of uses. Willard, Conveyancing, 419; 3 Wash. Real Prop., ch. 5.

afford so many examples, have become in a great measure obsolete and inapplicable.

In the United States conveyances derive their effect from the statutes of the several states, and, as a general rule, no other or further formalities are required than those specifically prescribed. It is further true, however, that in most instances these statutes expressly refer to the common-law forms, and, except in the case of what are known as "statutory forms," the ancient deeds, modified by time and circumstance, are still the effective means by which real property is transferred.

For purposes of convenience in the orderly treatment of the subject we may broadly classify conveyances as:

1. Governmental, or public.
2. Individual, or private.
3. Fiduciary, or official.

Under these three heads are comprehended all forms of conveyance.

1. *Governmental, or Public Conveyances.*

Forms of public grant.—Reference has heretofore been made to the methods employed in the original divesture of title by the government, the effect to be accorded to such methods, and the character of the title thereby acquired.[1] As we have seen, the primary conveyance of lands is accomplished (1) by means of an act or resolve of the legislature, or (2) by a formal instrument called a *patent;* but where the conveyance is of lands held by a derivative title, the operative instrument is not distinguishable, except in minor particulars, from deeds between individuals. So, too, where title in the state has been acquired as the result of forfeiture, the instrument of conveyance may be, and generally is, a modification of some form of private grant, notwithstanding the title is not in any proper sense derivative.

In considering the various forms of conveyance by public grant, we may separate them into two general classes, based

[1] See p. 160, *supra*.

upon the specific character of the title by virtue of which the grant is made. Thus, we find that the government, both state and federal, holds lands as a sovereign proprietor, the title to which was acquired by conquest or cession. Again, it may hold lands in the same paramount right, but derived through a summary exercise of its sovereign power in the way of forfeiture or confiscation or, by the exercise of the right of eminent domain. In either case the title, for all practical purposes, may be considered as original, but the methods of transfer are quite dissimilar. The former class we may not inaptly style as

(a) *Proprietary lands;* the latter as

(b) *Forfeited lands,*

And treat them accordingly when describing the forms of alienation. The state may also hold lands by a derivative title through the operation of escheat or simple purchase but these lands are disposed of by what, in effect, is nothing more than private grant, and deeds for same are not distinguishable from deeds between individuals.

(a) *Public Conveyances of Proprietary Lands.*

Generally.—A public conveyance, in the sense contemplated by this work, was by the common law denominated a *king's grant*, and was always made by *matter of record*, as distinguished from an assurance by deed, even though the grant was further evidenced by charter or patent. In the United States this principle has largely been retained, and public divesture of title may still be properly said to be by matter of record, whatever may be the form of the operative instrument of conveyance. Like the king's grants, it may be by charter or patent, executed by the executive or ministerial officers of government; or it may be the act of the legislature representing the sovereignty of the people, and requiring no other or further evidence than the record of such act.

Patents defined.—A patent has been defined as a grant of some privilege, property, or authority, made by the

government or sovereign of a country to one or more individuals, and the term, as originally used in England, is said to have signified certain written instruments emanating from the king, and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises, and were called letters patent from being delivered open, and, by way of contradistinction from instruments which went out closed or sealed.[1] In the United States the word is used to denote those instruments which secure to inventors, for a limited time, the exclusive use of their inventions; but when employed in connection with real property, it means the title deed by which a government, either state or federal, conveys its lands.

Patents from the United States.—A patent of the United States is the conveyance by which the nation passes its title to the public domain, and is the highest evidence of title known to the law; it is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled by some competent tribunal.[2] When delivered to and accepted by the grantee, it passes the full legal title to the land,[3] and carries with it the presumption that all the prerequisites of law have been complied with.[4]

But the patent must show upon its face a regular issue and a full compliance with the formalities of law, for a patent forms no exception to the rule that the legal title to lands can be conveyed only in the form provided by law.[5] The principal requisites in this respect have reference mainly to execution and authentication. To conform strictly to the letter of the law, the patent must be signed in the name of the president, either by himself or his duly appointed

[1] 2 Bouv. Law Dict. 298.

[2] United States v. Stone, 2 Wall. 525; Strong v. Lehmer, 10 Ohio St. 93; Stoddard v. Chambers, 2 How. 284.

[3] Moore v. Robbins, 6 Otto, 530; Le Roy v. Jamison, 3 Saw. (C. Ct.) 369.

[4] Sweat v. Corcoran, 37 Miss. 513; Hill v. Miller, 36 Mo. 182; Collins v. Bartlett, 44 Cal. 371; Winter v. Crommelin, 18 How. 87; Stringer v. Young, 3 Pet. 320.

[5] McGarrahan v. New Idria Mining Co., 96 U. S. (6 Otto), 316.

secretary, sealed with the seal of the general land office, and countersigned by the recorder. Until all of these have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory; and neither the signing nor the sealing nor the countersigning can be omitted any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands.[1]

Continued—Delivery.— Unlike conveyances between individuals, a formal delivery of a patent is not essential to its validity, nor will non-delivery defeat the grant.[2] The modern doctrine of delivery derives much of its importance from the ancient livery of seizin. No livery of seizen, however, was necessary of the king's grants, which were made matters of record, for when the seal was affixed to the instrument and enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. In a like manner when a patent for public lands has been made out and signed by the president, the seal of the United States affixed, and the instrument countersigned by the recorder of the land office and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States and needs no further delivery or other authentication to make it perfect and valid.[3] In such case the title to

[1] McGarrahan v. Mining Co., 96 U. S. 316.

[2] It is the practice of the general land office to transmit patents, as rapidly as completed, to the various local offices for delivery on surrender of the duplicate receipt or certificates. Frequently, however, they remain uncalled for, and on the discontinuance of a local office all undelivered patents remaining in its files are returned to the general land office where they are assorted, filed and preserved. See Rep. General Land Office, 1875.

[3] Gilmore v. Sapp, 100 Ill. 297.

the land conveyed passes by matter of record to the grantee, and delivery, as in case of private individuals, is not necessary to give effect to the granting clause of the instrument.[1]

Theoretically, in order that a patent may take effect as a conveyance, it is essential that there be an acceptance on the part of the grantee; but the acts required to be done by him in the preparation of his claim are equivalent to a positive demand for the patent, and where the patentee does not expressly dissent, his assent and acceptance are always presumed from the beneficial nature of the grant.[2]

Some confusion has arisen as to the time when a patent takes effect, that is, when it becomes operative as a conveyance, and binding upon both parties, from not distinguishing between acts which bind the government and acts which bind the patentee. No one can be compelled by the government, any more than an individual, to become a purchaser, or even to take a gift. Nor can the burdens or advantages of property be thrust upon him without his assent, and the patent of government, like the deed of a private person, must, in order to take effect as a conveyance, and transfer title, be accepted by the grantee; yet, as we have seen, the possession of property is so universally considered a benefit, that, in the absence of express dissent, an acceptance is presumed whenever the conveyance is placed in condition for acceptance, and this occurs when the last formalities required by law of the officers of the government are complied with. By the execution, sealing and recording, open and public declaration is made that, so far as the government is concerned, the title to the premises has been transferred to the grantee. The record stands in place of the offer for delivery in the case of a private deed; and the instrument is thenceforth held for the grantee, who takes in such case by matter of record.[3]

[1] United States v. Schurz, 102 U. S. 378; Le Roy v. Jamison, 3 Saw. (C. Ct.) 369; Houghton v. Hardenberg, 53 Cal. 181.

[2] Pierre Mutelle Case, 3 Op. Att'y Gen. 654; Le Roy v. Jamison, 3 Saw. (C. Ct.) 369.

[3] Le Roy v. Jamison, 3 Saw. (C. Ct.) 369; Green v. Liter, 8 Cranch (U. S.), 247; Gilmore v. Sapp, 100 Ill. 297.

General land office record.— Patents do come within the provisions of the recording laws of the state, where the terms of the statute do not specifically include them,[1] though it is usual to record them in the county where the land is situate, and such registration, as a rule, is expressly permitted by statute. The act for the establishment of a general land office provides that all patents issuing from that office "shall be recorded in said office in books to be kept for the purpose," and the indorsement of such record will always be found upon the patent.

This original record is not in itself a grant of title, but it is an evidence of equal dignity with the patent, because, like the patent, it shows that the grant has been made. The record called for by act of congress is made by copying the patent to be issued into the book kept for that purpose, and such record, as a matter of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy.[2] The public records of the departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department.

Construction of patents.— It is a rule of general application to public grants that such grants are to be construed most favorably to the public and most strongly against the grantee; that nothing passes by same except what is expressed in unequivocal language, and that whatever is not unequivocally granted is deemed to be withheld, nothing passing by implication. In late cases, however, it has been held that this rule does not apply, at least to its full extent, to grants made upon adequate valuable consideration, but refers rather to gratuitous grants made by the sovereign upon the solicitation of the grantees.[3]

[1] Moran v. Palmer, 13 Mich. 367; Curtis v. Hunting, 6 Iowa, 536.

[2] McGarrahan v. New Idria Mining Co., 6 Otto, 316; Sands v. Davis, 40 Mich. 14.

[3] Langdon v. New York, 93 N Y. 129; Charles River Bridge v Warren Bridge, 7 Pick. (Mass.) 344. The reason generally given for the rule is, that in a grant pro-

But little room for construction will ordinarily be found in patents, and when rules of construction are invoked it is usually to determine matters relating to description. In such cases it has been held that the entire description of the lands given in the patent must be taken together, and the identity of the land ascertained by a reasonable construction of the language used. If, however, there be a repugnant call, which by other calls of the patent clearly appears to have been made through mistake, the patent will still be valid and the ambiguity or doubt which may arise may be explained in the same manner and under the same rules that obtain between private grantors and grantees.[1]

Patents from the State.— Much that has been said with reference to patents from the federal government will apply to patents from the state. The formalities incident to such patents have reference mainly to statutory requisites relative to issuance and execution; and while the instruments closely follow the forms adopted by the national government, minor differences of detail will be found varying with the locality. Ordinarily a state patent, analogous to those issued by the general government, is under the hand of the chief magistrate and authenticated by the great seal. Such a course is, however, by no means uniform, the statute often prescribing other and different formalities.[2]

ceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the sovereign by reason of the uncertainty.

[1] Boardman v. Reed, 6 Pet. (U.S.) 328; McIver v. Walker, 9 Cranch (U. S.) 173.

[2] Thus, in Wisconsin, the commissioners of school and university lands are alone authorized to convey such lands, and that power cannot be transferred to others; hence, a patent issued by the governor and secretary of state, although in conformity to the general statute regulating patents, would be void and inoperative to pass the title to that particular class of lands. McAbee v. Mazzuchelli, 13 Wis. 478. So, too, in Illinois, the canal lands are conveyed by the trustees of the canal, and in many states similar conditions will be found to prevail. In all cases of this kind the immediate grantors are usually first formally invested with title by the state, in which event they become, in effect, fiduciaries, and their deeds will fall under the head of

Legislative grants.— A grant of land by statute is the highest and strongest form of title known to our law,[1] and does of itself, *proprio vigore*, pass to the grantee all the estate of the government except what is expressly excepted.[2] As a primary conveyance it is not in general use, for, as a rule, the government parts with its title only by patent; but when purporting to convey land in words of present grant, it vests a perfect and irrevocable title.[3]

Construction of Legislative Grants.— A legislative grant is regarded as an executed contract,[4] and as such is within the clause of the constitution of the United States which prohibits the states from passing any law impairing the obligation of contracts. It cannot, therefore, be destroyed, and the estate divested by any subsequent legislative enactment. The rule applies with equal force to corporations as to individuals; and when the state enters into a contract with a municipal corporation, the subordinate relation of the corporation ceases, and that equity arises which exists between all contracting parties. The control of the legislature over the corporation can be exercised only in subordination to the principle which secures the inviolability of contracts.[5] Congressional grants are governed by the same rules, and a grant by congress to a state cannot be recalled at the will of congress any more than a grant to an individual.[6]

Generally, in a conveyance by the sovereign of property which is usually the subject of private ownership, the extent of the thing granted is to be ascertained by the rules of construction applicable to private conveyances; yet in con-

official conveyances and be governed by the general rules which apply to this class of instruments.

[1] 11 Opinions Att'y-Gen. 47.

[2] 9 Opinions Att'y-Gen. 253.

[3] Strother v. Lucas, 12 Pet. (U.S.) 454; Terrett v. Taylor, 9 Cranch (U. S.) 50; Chouteau v. Eckhart, 2 How. (U. S.) 372; Swann v. Lindsey, 70 Ala. 507; Dean v. Bittner, 77 Mo. 101.

[4] The Binghamton Bridge, 3 Wall. (U. S.) 51; Dartmouth College v. Woodward, 4 Wheat. (U.S.) 625; Dingman v. People, 51 Ill. 267.

[5] Grogan v. San Francisco, 18 Cal. 590.

[6] Busch v. Donahue, 31 Mich. 480; Rice v. Railroad Co., 1 Bl. 358.

struing a congressional or legislative grant, it must be remembered that the act by which the grant is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress, and that the rules of the common law must yield, as in all other cases, to the legislative will.[2] Another exception will be observed, in that the ordinary rule construing the grant most strongly against the grantor is here reversed, and whatever is not given expressly, or very clearly implied from the words of the grant, is withheld.[2]

Formal requisities.—No particular terms or phraseology are necessary in grants by congress or the legislature,[3] which will vary with the exigencies of each particular case. The usually operative words are "be, and hereby is, granted, confirmed," etc.

(b) *Public Conveyances of Forfeited Lands.*

Generally considered.—The second class of conveyances by public grant, while comprehending all deeds or enactments made under the law relating to confiscation, forfeiture, eminent domain, etc., is confined mainly to deeds executed by virtue and in pursuance of the taxing power of the state. Sales and conveyances by order of courts, and which result from some regular action had therein, are frequently, but erroneously, called public grants. The mere fact that such conveyances are authorized and confirmed by legal tribunals, does not, in any just sense, give to them the character of public grants, and the titles thus acquired are strictly derivative. It is true they are made by authorized officers whose acts and functions are of a public nature, but in every instance, in the transfer of land, such officers are merely trustees and their conveyances but fiduciary acts. A public grant, in its proper signification, contemplates only that form

[1] Railroad Co. v. Railroad Co., 97 U. S. 491.

[2] Mayor, etc., v. Railroad Co., 26 Pa. St. 355; Railroad Co. v. Litchfield, 23 How. 88.

[3] Coburn v. Ellenwood, 4 N. H. 99.

of alienation in which the public in its organized capacity — the state — is the immediate grantor.

Nature of Taxation.— Taxes are burdens or charges imposed by the legislative power, upon persons or property, to raise money for public purposes or to accomplish some governmental end.[1] This power is vested wholly in the legislature, though municipalities may exercise same by a special delegation of authority, and is unrestricted except when it is opposed to some provision of the federal or state constitution.[2] The right of taxation has for its foundation the principle that the citizen shall contribute to the support of the government which protects his person and property, in just proportion to the value of the property protected;[3] and equality, so far as is practicable, is its distinguishing characteristic.[4] While it is scarcely possible to attain absolute equality in all cases, or benefits commensurate with the burden of taxes imposed, yet the principle upon which the approximation to equality is to be maintained must be preserved inviolate in this: that all property subject to taxation shall be uniformly assessed according to value — a rule applicable to all taxation, whether for general, local or special purposes.[5]

The legislature, as we have seen, is the sole source and repository of the taxing power; the counties and other municipal divisions are mere auxiliaries of the government, established simply for the more effective administration of justice, and the power of taxation, as confided to them, is a dele-

[1] Hanson v. Vernon, 27 Iowa, 28; Mitchell v. Williams, 27 Ind. 62; Blackw. Tax Tit. 1.

[2] People v. Marshall, 1 Gilm. (Ill.) 672; Wider v. East St. Louis, 55 Ill. 133.

[3] Dunleith v. Reynolds, 53 Ill. 45; In re Van Antwerp, 56 N. Y. 265.

[4] Sherlock v. Village of Winnetka, 60 Ill. 530; Holbrook v. Dickinson, 46 Ill. 285; Weeks v. Milwaukee, 10 Wis. 242; Attorney-General v. Plankroad Co., 11 Wis. 35.

[5] Peay v. Little Rock, 32 Ark. 31; Chicago v. Larned, 34 Ill. 253; McCormack v. Patchin, 53 Mo. 33; Weeks v. Milwaukee, 10 Wis. 242; People v. Bradley, 39 Ill. 130; Ottawa v. Spencer, 40 Ill. 211; Attorney-General v. Plankroad Co., 11 Wis. 35; Sœns v. Racine, 10 Wis. 371.

gated trust, and is to be strictly construed. They act, not by virtue of inherent power, but as mere agencies of the state.[1]

Two terms are in common use in this branch of the law to indicate impositions under the taxing power, viz., *taxes* and *assessments*. The latter term may properly be employed to designate the ordinary charges that a municipality imposes from year to year,[2] but this is not its customary use for these matters we generally allude to as a *tax*, or more specifically, the *general taxes*. An *assessment*, as distinguished from other kinds of taxation, means those special and local impositions upon property in the immediate vicinity of municipal improvements which are necessary to pay for such improvements, and are laid with reference to the special benefit which the property is supposed to have derived therefrom.[3]

Tax sales.— If the owner of property assessed for taxation neglects or refuses to pay the burden thus imposed the lands thereby affected become subject to forfeiture and sale. The methods pursued form the muniments of the title so acquired.

Taxation, while an inherent right of government, is regulated in all states by express statutes which provide methods for the collection of the tax and the enforcement of payment, by sequestration of the property affected in case it is withheld. Whatever be the methods employed, the proceedings are summary in their nature and the requirements of law must be strictly pursued or the whole transaction will be void.[4] When special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, the owner has a right to insist upon a strict performance of all the material requirements of the statute, especially those designed for his security, and the

[1] Railroad Co. v. Washington County, 30 Gratt. (Va.) 471; United States v. New Orleans, 98 U. S. (8 Otto) 381.

[2] Boers v. Barrett, 2 Cin. (Ohio) 67.

[3] Hale v. Kenosha, 29 Wis. 599.

[4] Charles v. Waugh, 35 Ill. 315; Cahoon v. Coe, 57 N. H. 556; Clarke v. Rowan, 53 Ala. 401; People v. Biggins, 96 Ill. 481; Abbott v. Doling, 49 Mo. 302.

non-observance of which may operate to his prejudice.[1] It is not the policy of the law to deprive the citizen of his property by sales made on account of the government through its officers, who have no interest in the matter, without putting him wholly in fault in not complying with his obligations.[2]

Tax deeds.—Neither the legal nor equitable title to lands sold for non-payment of taxes vests in the purchaser until the execution and delivery of the tax deed.[3] This deed does not operate *ipso facto* to transfer the title of the owner as in ordinary deeds between individuals, but is the last act of a series of proceedings upon the regularity of which it depends for its character and effect. It is not title in itself, nor, unless aided by statute, even evidence of it. Its recitals bind no one, and it creates no estoppel upon the former owner.[4]

The mere production of the deed, in the absence of statutory aid, creates no presumption in its favor until all the anterior proceedings prescribed by law have been affirmatively shown to have been complied with, when it becomes conclusive evidence of title according to its extent and purport. This doctrine, which has long obtained in this country, is based upon the policy that it is better that the purchaser should lose the small amount of his bid rather than the owner should forfeit a valuable estate, where the proceedings show irregularity or illegality,[5] and the burden of proving title under tax deeds has been thrown upon him who asserts such title.

[1] Marsh v. Chestnut, 14 Ill. 223; Holbrook v. Dickinson, 46 Ill. 285.

[2] Rivers v. Thompson, 43 Ala. 633. The lien of taxes is purely legal in its character, the creature of the statute, not arising upon contract, and can be enforced in the mode provided by the law of its creation, and in no other manner. People v. Biggins, 96 Ill. 481.

[3] Stephens v. Holmes, 26 Ark. 48; Insurance Co. v. Scales, 27 Wis. 640; Bracket v. Gilmore, 15 Minn. 245; Lake v. Gray, 35 Iowa, 44.

[4] Blackw. on Tax Titles, *364; Jackson v. Esty, 7 Wend. 148.

[5] Blackw. on Tax Titles, *68; Denning v. Smith, 3 Johns. Ch. 344; Jackson v. Morse, 18 Johns. 442.

Continued — Statutory modifications.—Though the rule of the common law, that he who affirms the existence of a material fact must prove it, was for many years applied to sales for taxes in all its unbending rigidity, until the astuteness of judicial refinement had rendered almost inoperative all legislation providing for such sales, a marked change is now apparent in many states. Stringent legislation has endeavored to counteract the tendency of judicial refinement by declaring the operation and effect of tax deeds, and such conveyances in a majority of the states, when formal and duly executed, are now taken as *prima facie* or presumptive evidence of the regularity of all proceedings, from the listing or valuation of the land up to the issuance of the deed; while a few states have gone so far as to declare such deeds conclusive evidence of every matter or fact required by law to make a good and valid sale and vest title in the purchaser, except the facts of exemption, payment and redemption, and as to the non-existence of those facts it is made *prima facie* evidence.[1] This doctrine, however, has been expressly repudiated by the courts as an unconstitutional confiscation of property, and the rule has been announced that the legislature can make a tax deed conclusive evidence of the regularity of prior proceedings only as to non-essentials or matters of routine which rest in mere expediency.[2] But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and a sale thereof on that account. As to the performance of these acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence.[3]

[1] See Gwynne v. Neiswanger, 18 Ohio, 400; Allen v. Armstrong, 16 Iowa, 508.

[2] Acts which need not have been required in the first place—as the affidavit of the sheriff to the delinquent list—and which the legislature may by a curative act excuse when omitted. Marx. v. Hawthorn, 12 Saw. (C. Ct.) 374.

[3] Allen v. Armstrong, 16 Iowa, 508; MacCready v. Sexton, 29 Iowa, 356; Rally v. Guinn, 76 Mo. 263; Callanan v. Hurley, 93 U. S. 387; Steeple v. Dowing, 65 Ind. 501.

It would seem to be well settled, however, that the legislature has the power to make a tax deed *prima facie* evidence of material facts, upon which the right to sell and convey depends, and when this has been done it has the effect to entirley change the burden of proof, relieving the purchaser therefrom and imposing it upon the person who attempts to controvert the deed;[1] but whenever it is shown that any essential particular in the anterior proceedings has been irregular, the authorities are quite harmonious in declaring its *prima facie* character to be lost;[2] and when the *prima facie* character, as established by statute, is overthrown, the common-law principles stated in the preceding paragraph at once attach, and the person asserting the title must prove by satisfactory evidence the regularity of the proceedings.

The law declaring a tax deed *prima facie* evidence of title does not dispense with the statutory requirements which precede the sale, but only shifts the burden of proof from the party claiming under the deed to the party inpeaching it.[3]

Continued—Formal parts.—The form and substance of tax deeds are now usually prescribed by statute, in which case a strict conformity is required or the deed will be void,[4] though if defective a new deed will usually issue to the person entitled,[5] and the deed will not be avoided for slight irregularities or variances from the statutory form.[6]

[1] Biscoe v. Coulter, 18 Ark. 423; O'Grady v. Barnishee, 23 Cal. 287; Watson v. Atwood, 25 Conn. 313; Millikan v. Pattersen, 91 Ind. 515; Clark v. Connor, 28 Iowa, 311; Hart v. Smith, 44 Wis. 213.

[2] Sibley v. Smith, 2 Mich. 486; Graves v. Bruen, 11 Ill. 431; Turney v. Yeoman, 16 Ohio, 24; Rayburn v. Kuhl, 10 Iowa, 92; Thompson v. Ware, 43 Iowa, 455.

[3] Williams v. Kirtland, 13 Wall. 306.

[4] Chandler v. Spear, 22 Vt. 388; Boardman v. Bourne, 20 Iowa, 134; Kruger v. Knob, 22 Wis. 429. The form in such case becomes substance, and must be strictly pursued. Atkins v. Kinman, 20 Wend. 249.

[5] Finley v. Brown, 22 Iowa, 538; Woodman v. Clapp, 21 Wis. 350.

[6] Bowman v. Cockerill, 6 Kan. 311.

The ordinary incidents of deeds attach to this class of conveyances, and in most respects they stand upon the same footing as deeds between individuals.[1] To attempt an enumeration of the special distinctive features, however, would be impossible in this connection, as few subjects have been so harassed by legislative tinkering, both as to the methods of sale and its evidence, as the sale of land for taxes. Inasmuch, however, as the deed does not derive its validity from its capacity as an independent conveyance to transfer the estate described in it, but from the existence of a power and compliance with prescribed conditions, it should show upon its face an essential execution of the power in pursuance of which it purports to have been made.[2] This rule is of uniform operation everywhere. All the recitals provided by law, which go to show full compliance, are necessary and integral parts, and the failure to recite any one of the prerequisites to a valid sale will raise a presumption that the omitted requirement was not complied with.[3] The execution and authentication are purely matters of local statutory regulation.

The later forms of tax deeds prescribed by statute are very short and concise, and the recitals confined to a few material

[1] Blakely v. Bestor, 13 Ill. 708. The construction of a tax deed in respect to the description of the land conveyed must be the same as if such description were used in a deed between private individuals. The doctrine of strict construction, as applied to the execution of naked statutory powers, has no application in such case. Blakely v. Bestor, 13 Ill. 708.

[2] Blackw. Tax Tit. *368; Jackson v. Roberts, 11 Wend. 425; Tolman v. Emerson, 4 Pick. 160.

[3] Long v. Burnett, 13 Iowa, 29; Lain v. Cook, 15 Wis. 446; Large v. Fisher, 49 Mo. 307. A ministerial officer, in making a return or recital as to how he executed a power, must set out the facts and the manner in which he performed the act, and let the court determine whether they comply with or are in accordance with the law. The sale of property for taxes is an *ex parte* proceeding. The officer acts at his own peril, and must perform every prerequisite required by statute before the title of a citizen to his property can be taken from him. The deed must show affirmatively that the law has been complied with in all particulars. Spurlock v. Allen, 49 Mo. 178; Abbott v. Doling, 49 Mo. 302; Annan v. Baker, 49 N. H. 161.

points, while their legal effect and operation is expressly defined by law, as in case of deeds between individuals after statutory forms. The execution of the deed is usually confided to the county clerk or other officer having the custody of the tax records.

The nature and characteristics of a tax title have already been fully described in a former part of this work and the student may with profit refer to same in connection with the foregoing.[1]

2. *Individual, or Private Conveyances.*

Defined and classified.—The different modes of voluntary alienation, or rather the legal evidences of such alienation, were formerly known as *common assurances*, being the means whereby every man's estate was assured to him and all doubts or controversies respecting same either removed or prevented.[2] Assurances transacted between two or more private persons were called *deeds*, or matters *en pais* (in the country), and were so styled because, according to the old law, the assurance was given upon the very spot or piece of land to be transferred. Deeds were further distinguished from assurances transacted only in the king's courts, which were called matters *of record*.[3]

[1] See *ante*. p. 187.

[2] Cruise, Dig., tit. 32, ch. I.

[3] Assurances *of record* were known respectively as *fines* and *recoveries*. A *fine* was an amicable composition or termination (*finis*) of a suit, either actual or fictitious, whereby the land which formed the subject in controversy was acknowledged to be and thereby became the property of one of the parties to whom the fine was levied. Originally it was founded on an actual suit, commenced for the recovery of the possession of land; the possession thus gained by such composition was found to be so sure and effectual, that fictitious suits were instituted for the sake of obtaining the same security.

A *common recovery* was an action, either actual or fictitious, not compromised, but carried on through every regular stage of proceeding, by means of which the lands which were the subject of the action were recovered against the tenant of the freehold, and all persons were bound, as by an actual adjudication of the right, and an absolute fee simple was thereby vested in the recoverer. Smith Real Prop. 738. These methods have been abolished in England by statute.

From very simple forms deeds eventually became highly technical, while the efforts of the conveyancers to defeat or counteract the effect of remedial laws introduced, in time, a large number of distinctive methods of conveyance. With the rest of our English inheritance, these methods have become a part of the common law of this country, and still find a practical employment in most, if not all, of the states. Except where the statute has prescribed a model, the old forms, modified to meet the exigencies of modern times, are still used, and even where statutory forms are given, recourse must still be had to the old deeds in many instances.

The earliest forms of conveyance were those developed by the common law;[1] but as the deeds which were subsequently framed under the statute of uses are those which form the basis of the American system of conveyancing, they properly claim our prior attention. In the succeeding paragraphs an attempt will be made to describe the nature, operation and effect of deeds of conveyance now in common use between individuals, and for convenience they may be classified as:

(*a*) Conveyances derived from the *statute of uses*, and

(*b*) Conveyances derived from the *common law*.

As derivatives and adaptations of these two primary species we further find:

(*c*) Conveyances by *delegated authority*, either by power of attorney or appointment;

(*d*) conveyances *in trust*, as where the legal estate is held by one for the use of another;

(*e*) conveyances *by way of pledge*, as where lands are

[1] It is a not infrequent practice of text writers to comment on the simplicity of conveyances in Saxon times but in most instances the information furnished is drawn from the inner consciousness of the writers or copied without investigation from some equally uninformed antecedent writer. As a matter of fact we know comparatively nothing of English real property law prior to the Norman conquest, and much that has been written, even by students of legal history, is pure conjecture. Nor was it until the reign of Henry II that the laws relating to land began to assume definite shape.

charged with a lien to secure the fulfillment of an obligation; and

(*f*) conveyances of *chattels real*, as the creation or transfer of a term of years.

In the framing and phraseology of these various classes of deeds is exhibited the practical application of the legal theories which have engaged our attention in the prior chapters of this work. As an adjunct to their study it is recommended that the student procure copies of the common printed forms of each of the various kinds of deeds hereafter described, and note carefully the differences in the structure and phraseology of each variety. A reliable form-book would, perhaps, be better still.

(a) *Conveyances Derived from the Statute of Uses.*

Nature and effect.— As has been shown,[1] it was at one time a common practice, in England, for a person seized of lands to bargain and sell the same to another, usually by a secret conveyance, and in such case, if the consideration was sufficient to raise a use, the bargainor became seized to the use of the bargainee. To avert the evil consequences resulting from such acts, the statute of uses had the effect of immediately transferring the legal estate and possession to the bargainee, or, as it is technically termed, executing the use, by uniting the legal possession to the beneficial interest and thus making but one estate.[2] The effect of this statute was to give rise to several new species of conveyances operating quite contrary to the rules of the common law and yet having a legal validity. Actual livery of seizin, an indispensable requisite at common law, was wholly dispensed with, the statute transferring possession by operation of law, and the possession thus transferred was not a mere possession in law, but an actual seizin or legal estate.

Another effect was to introduce methods of dealing with the legal interest, in respect to the period and conditions of its commencement and termination, which before that time

[1] See *ante*, p. 118.

[2] Cruise, Dig., tit. 32, ch. 9; 2 Black. Com. 268; 4 Kent Com. 490; Wms. Real Prop. 155.

were wholly impossible. Because there could be no livery of an estate to commence in possession at a future day such estates could not be created at law, and the nearest approach was a use. But under the operation of the statute such grants now became effectual at law, and the conveyancers at once began to create estates of complicated limitations. Indeed we may say that what may be called the modern law of real property, and the technical and intricate systems of conveyancing, which still, in a modified form, prevail, dates from and grew out of the legislation of this period.[1]

Three different forms were evolved under this statute by the conveyancers, the principal of which was called a *bargain and sale.* As a use could not be raised without a consideration, and as a bargain and sale was merely the conveyance of a use, it became necessary, in every instance, that the conveyance should be supported by a valuable or pecuniary consideration, and it is from this circumstance that the mention of consideration owes whatever importance it has in modern deeds.

It is said that when the statute of uses was enacted it was foreseen that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private or secret nature. To avoid such secret conveyances a supplementary act provided that thenceforth all such deeds should be in *writing* and *enrolled* in one of the courts at Westminster or within the county where the lands were situate, such latter provision being the germ of the American registration laws.

A second form was called a *covenant to stand seized.* This was where one agreed to hold land for the use of some relation, in which case the consideration of natural affection was sufficient to raise a use in favor of the covenantee.[2] Under both of these forms a consideration was required to raise a use; in the former money or its equivalent, in the latter blood or marriage. In both instances the statute executed the use and vested a legal title in the beneficiary.

[1] That is, the period of Henry VIII, commencing say about, 1535.

[2] Digby Hist. Law Real Prop. 328; Gilbert Uses, 92.

There was a third form, which is usually classed with those conveyances deriving their effect from the statute of uses, called a *lease* and *release*. Only one part, however, was derived from the statute, the other being from the principles of the common law. It consisted of a bargain and sale for a year (a lease), and a common law release, operating by way of enlargement of the estate. It was very popular in England, where for many years it formed the principal method of conveyance, but never seems to have been employed to any extent in this country.[1]

The two forms last described have never received such recognition in this country as to render a further mention necessary, but from a very early period the deed of bargain and sale has been employed as an operative instrument of conveyance, and at present has almost entirely superseded the common-law deeds. Indeed, even when common-law deeds are ostensibly employed, they are usually but adaptations of common-law forms to the methods of a bargain and sale.[2] In fact there is now no practical distinction between the two species.

Warranty deeds.—The most familiar form of conveyance known to our law is the deed of bargain and sale, technically called a *warranty deed*. The legal import of a deed of this

[1] The method seems to have been contrived as an evasion of the law relating to enrollment. This law provided that every bargain and sale of a freehold should be enrolled in one of the courts. The statute did not require the enrollment of a bargain and sale of a term. Therefore, in order to secure privacy in the sale it became customary for the vendor to make a bargain and sale for a year to the person to whom the lands were to be conveyed. By this a use was raised in the bargainee, without any enrollment, to which the statute transferred the possession. Thus the bargainee became immediately capable of accepting a release of the freehold and reversion; then a release was made to him dated the day after the date of the bargain and sale, and this was considered as equal to a feoffment with livery of seizin. See Cruise Dig., tit. XXXII ch. 11.

[2] Thus, it is not uncommon to meet with forms borrowed from the ancient charter of feoffment, modified by a declaration of the uses to which the estate is to be held, and the deed operates as a bargain and sale.

character is that of absolute conveyance of whatever interest may be intended, and that there is no resulting trust in the grantor, who is estopped from ever after denying its execution for the uses and purposes mentioned in it,[1] while its name is derived from the personal covenants which follow the *habendum*. It operates as a complete divesture of all present as well as future interests and any rights or titles subsequently acquired by the grantor inure to the benefit of the grantee.

The operative words of conveyance in this class of deeds are "grant bargain and sell," which in many states constitute covenants of seizin, freedom from incumbrances, and quiet enjoyment,[2] unless their statutory effect is rendered nugatory or limited by express words contained in such deed.[3] It is still a common practice for the conveyancer to insert in warranty deeds, as well as in other classes of conveyances, all the operative terms used in transferring land; but their presence, save where they imply covenants, is no longer necessary. It must, of course, be understood that some words evidencing an intention must appear, but the conveyancer has a choice of a number, and the word "convey," which is most in use, fully expresses the intent, and is effectual for all purposes.[4]

Quitclaim deeds.—There is in common use in the United States a species of conveyance derived from the deed of bargain and sale under the statute of uses, but bearing a strong resemblance to the old common-law deed of release, called a *quitclaim*. Its import is a conveyance or release of all present interest in the grantor; but, unlike the common-law release, which was only effectual in favor of some person in possession, or who claimed or had some interest in the land, it is equally available as a mode of conveying an

[1] Kimball v. Walker, 30 Ill. 482.

[2] This matter is statutory.

[3] Prettyman v. Wilkey, 19 Ill. 235; Finley v. Steele, 23 Ill. 56; Brodie v. Watkins, 31 Ark. 319.

[4] An extremely simple form of a deed in fee is given in 4 Kent Com. 461. And see Hutchins v. Carleton, 19 N. H. 487; Bridge v. Wellington, 1 Mass. 219.

independent title, and, for all practical purposes, is regarded as an original conveyance.

Effect of Quitclaim deeds.—A quitclaim deed is as effectual for transferring the title to real estate as a deed of bargain and sale,[1] and passes to the grantee all the present interest or estate of the grantor,[2] together with the covenants running with the land, unless there be special words limiting and restricting the conveyance.[3] But while a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the parties as gathered from the instrument; and if the words used indicate a clear intention to pass only such land or interest as the grantor then owns, lands embraced in a prior valid deed have been held to be reserved from its operation, even though such prior deed remains unrecorded.[4] It is a rule, however, of general application, that a quitclaim deed, when recorded, takes precedence of a prior unrecorded warranty deed from the same grantor, the purchaser under the quitclaim having no notice of the prior deed, and there being no words therein suggestive of an earlier conveyance.[5]

Operation of Quitclaim deeds.—A quitclaim deed, though effectual as a present conveyance, when unaccompanied by warranty will not operate to carry a subsequently acquired title,[6] that is, it does not estop the grantor from doing anything in derogation of his grant, as is the case where the conveyance purports to be an absolute grant or is accompanied with warranty, nor can one who takes under

[1] Morgan v. Clayton, 61 Ill. 35; Rowe v. Pecker, 30 Ind. 154; Pingree v. Watkins, 15 Vt. 479.

[2] Nicholson v. Caress, 45 Ind. 479; Carter v. Wise, 39 Tex. 273; Carpentier v. Williamson, 25 Cal. 158.

[3] Brady v. Spruck, 27 Ill. 478; Marden v. Chase, 32 Me. 329.

[4] Hamilton v. Doolittle, 37 Ill. 473.

[5] Brown v. Coal Oil Co., 97 Ill. 214; Graff v. Middleton, 43 Cal. 341; Marshall v. Roberts, 18 Minn. 405.

[6] Comstock v. Smith, 13 Pick. 116; Jackson v. Winslow, 9 Cow. 13; Harriman v. Gray, 49 Me. 538; Kinsman v. Loomis, 11 Ohio, 475; Miller v. Ewing, 6 Cush. 34.

such a deed be regarded as a *bona fide* purchaser without notice of outstanding titles and equities.[1] He obtains just such a title as the vendor had, and the land in his hands remains subject to all the equities attaching to it in the hands of the vendor, though they may be unknown to such purchaser.[2] But it would seem this harsh doctrine is not applicable in all cases. It prevails in settling conflicting titles, and is intended to protect equities as against those charged with notice of their existence, but is never invoked to protect a fraudulent grantor who, by false representations, induces a confiding purchaser to believe that he acquires a clear title under a quitclaim deed.[3] In the absence of fraud, however, a party accepting a quitclaim deed takes the risk of the title;[4] for where a person purchases of another who is willing to give only a quitclaim, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title even as against himself, and it may be presumed that the purchase price is fixed accordingly.[5]

A different rule prevails as to the grantee of one holding under a quitclaim, when such grantee holds by a warranty deed, and in such case such subsequent grantee is presumed to be a *bona fide* purchaser for value. He is not affected by the mere fact that he takes through a quitclaim deed, and will take the title free from outstanding equities of which he had no notice. It is the policy of the law that real estate titles should become matters of certainty as far as possible; and as quitclaim deeds occur in the lives of many titles, a different rule than the one above set forth would tend to unsettle titles, hinder and delay improvements and impair the selling value of all such property.

[1] Stoffel v. Schroeder, 62 Mo. 147; Carter v. Wise, 39 Tex. 273; Springer v. Brattle, 46 Iowa, 688; Oliver v. Piatt, 3 How. (U. S.) 363.

[2] Mann v. Best, 62 Mo. 491; May v. Le Claire, 11 Wall. (U. S.) 217.

[3] Ballou v. Lucas, 59 Iowa, 22.

[4] Botsford v. Wilson, 75 Ill. 132; Thorp v. Coal Co., 48 N. Y. 253.

[5] Winkler v. Miller, 54 Iowa, 476.

Continued—Words of Grant.—The operative granting words of deeds of this nature are "remise, release, convey and quitclaim;" but any other words indicating conveyance will do as well and have the same effect. Should the deed contain the statutory words which raise covenants, then the instrument in effect becomes a warranty deed, though in form a quitclaim.[1] To raise a statutory covenant the very words of the statute must be used,[2] and if only a part of them appear, as "grant, sell and convey," the deed will remain a quitclaim.[3] It is the custom of conveyancers to insert after the words of grant a recital of the estate or interest conveyed, as all "right, title, interest," etc.; but this is the legal as well as the statutory effect of the deed, and their omission or insertion is immaterial. Where the deed contains covenants of any kind, particularly of warranty, these words become material, however, and in some states they are of controlling efficacy,[4] as per the succeeding paragraph.

Effect of covenants in Quitclaim deeds.—Inasmuch as the particular granting words employed in deeds are now of comparatively little moment, if one conveys land with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee, or those claiming under him, any title subsequently acquired, either by purchase or otherwise, and such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs and assigns.[5] But where the deed does not on its face purport to convey an indefeasible estate, but only "the right, title and interest" of the grantor, though containing covenants of ownership, warranty, etc., it will, it seems, only convey such interest in the land as the grantor has at the date of the deed,[6] and the covenants are to be re-

[1] De Wolf v. Hayden, 34 Ill. 525.

[2] Vipond v. Hurlbut, 22 Ill. 226.

[3] Whitehall v. Gottwal, 3 Pa. 323; Frink v. Darst, 14 Ill. 304; Young v. Clippinger, 14 Kan. 148.

[4] See Holbrook v. Debo, 99 Ill. 382.

[5] Comstock v. Smith, 33 Pick. 119.

[6] Brown v. Jackson, 3 Wheat. (U. S.) 449; Bowen v. Thrall, 28 Vt. 382; Blanchard v. Brooks, 12 Pick. (Mass.) 47.

garded as having reference to and as being qualified and limited by the grant.[1] In a like case, where the grantor agrees to warrant the title conveyed, only as against all claims derived from himself, he is understood to refer to existing claims and encumbrances, and not to any title he might afterward derive from a stranger.[2] A distinction has also been made by the courts between such deeds as quitclaim or release the land itself and such as merely release whatever interest the grantor may have in the land,[3] though the distinction is hardly apparent and does not always seem to rest in sound reason.

Special warranties.—There is in common use in the United States, though it would seem to be rarely employed in England, a deed of conveyance, with a limited warranty, variously known as a "special warranty" or deed of "non-claim." In its original form the non-claim was inserted immediately after the *habendum*, without the usual words of covenant being prefixed, and purported to be a denial of any further rights in the grantor in relation to the property conveyed, and from which he was "utterly debarred and forever excluded" by virtue of the instrument.[4] The covenant might be general, but was usually limited to the grantor and those claiming under him. As now framed it is a limited personal covenant, not as against paramount title, but only so far as concerns the acts of the grantor. It is a a covenant of warranty to the extent of its import, and differs from a general warranty only, in that one is warranty against any and all paramount titles, while the other is against the grantor himself, and all persons claiming by, through or under him.[5]

[1] Bell v. Twilight, 6 Foster (N. H.) 411; Rawle, Cov. for Tit. 420.

[2] Bogy v. Shoab, 13 Mo. 378; Gee v. Moore, 14 Cal. 474; Allen v. Holton, 20 Pick. 458; Holbrook v. Debo, 99 Ill. 372.

[3] See Holbrook v. Debo, 99 Ill. 372; Blanchard v. Brooks, 12 Pick. 46.

[4] See Rawle on Cov. for Title, p. 223 (3d ed.).

[5] Holbrook v. Debo, 99 Ill. 372; Porter v. Sullivan, 7 Gray, 441; Lathrop v. Snell, 11 Cush. 453.

Statutory forms.—While the tendency of courts and conveyancers has been to modify and reduce the common law forms of expression in conveyances of land, the radical hand of the legislator has been felt of late years in the sweeping changes made in many of the states in regard to the form, contents and effect of deeds and kindred instruments. Statutory forms are prescribed, as short and curt as those they are intended to supplant were often long and verbose. The wisdom of these forms has often been doubted, while their poverty of language has not endeared them to the conveyancer; and as the statute has left their use optional, they have not as yet, in many localities, come into very general use. The operative words of statutory deeds purporting to convey the fee are "convey and warrant," which words have also the effect of express covenants of seizin, good right to convey, freedom from incumbrances, peaceable possession and warranty of title. Deeds made in conformity to statute have all the force and effect of covenants that are usually contained in the common law deeds. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part as effectually as if they were written therein.[1] The operative words of conveyance of naked interests are "convey and quitclaim."

In a few states the desire to "simplify" has cut the verbiage down to the fewest words possible to effect a conveyance. The operative word of conveyance in these deeds is "grant," which is held to have effect as a covenant against the grantor's own acts.

(b) *Conveyances Derived from the Common Law.*

Generally considered.—In addition to the deed of bargain and sale, which, in its various modifications, has been made a statutory conveyance in a majority of the states, there are also in general use a number of technical forms of conveyance derived from the common law. But aside from their

[1] Carver v. Louthain, 38 Ind. 530; Kent v. Cantrall, 44 Ind. 452.

names they possess but few of the attributes formerly ascribed to them. Much of their original significance has been lost under our comparatively simple land system, and there now exist but few estates that cannot be adequately conveyed by deed of bargain and sale. Indeed, in a majority of instances a "quitclaim" deed will accomplish all that was formerly sought through the media of the verbose and highly technical deeds of the common law.

Common-law conveyances were divided into *primary* or *original* deeds, being where an estate was originally created. and *secondary* or *derivative* deeds, being where an estate already created was enlarged, restrained, transferred or extinguished.

The principal form was called a *feoffment*; which originally signified the gift of a feud, but by custom it came afterwards to signify a gift of a free inheritance, or *liberum tenementum*, to a man and his heirs, respect being had rather to the perpetuity of the estate granted than to the tenure.[1] Every kind of alienation during the early stages of English law was technically a "gift," and the operative words of conveyance in the *charter of feoffment*, as the early deed was called, were "give, grant and enfeoff." As a matter of fact the "gift" might be a pure donation, or in substance a sale or exchange, or possibly a lease with onerous service or heavy rent reserved, but in every case it was still, in legal contemplation, a gift.

Conveyance by feoffment was employed in England for many years prior to the enactment of the statute of uses, and was in active service until a comparatively recent period. Until the time of Charles II. it was not required to be in writing, and even after it became customary to make written deeds it was still necessary to its validity that it be accompanied by a livery of seizin; that is, an actual delivery of possession was required. This was done by the feoffor coming upon the land and taking the key of the door, a twig, or a piece of turf, and handing it the feoffee, or by simply stat-

[1] Cruise, Dig., tit. 32, ch. IV; 4 Kent Com. 489.

ing to the feoffee that he might enjoy the land according to the deed. This was called livery *in deed*, and was distinguished from livery *in law*, which was where the parties were in sight of the land, but not on it, and the feoffor indicated to the feoffee by apt words his intention that the latter should enter and take possession. The ceremony of investiture was performed in the presence of the freeholders of the vicinity, and afterwards, in case it should be called in question, they might testify to the livery. In these particulars the charter of feoffment was in marked contrast to the deed of bargain and sale, which dispensed with an actual livery. It is true that such latter deeds all recognized a seizin[1] as essential to give effect to the conveyance; but the statute transferred this by operation of law.

So much of the nature, operation or effect of deeds of feoffment as has been retained in American conveyancing has been merged in the deed of bargain and sale, and the operative words of grant of the ancient conveyance are still frequently used in modern deeds.

Conjointly with feoffment there seems to have been a form of conveyance known as *grant*. The feoffment was employed in conveyances of corporeal property and the grant in cases where the subject matter was incorporeal. These were the two great methods of disposal of real property rights in the primitive stages of the English law.

The next in importance of the primary common-law deeds was called a *lease*, a name it still retains. It is used mainly in the creation of a term of years and will be fully illustrated when we shall come to consider the conveyance of chattels real.

Of the secondary conveyances, the deeds of *release*, *confirmation*, *surrender* and *assignment* still exist in modified forms in all or a majority of the states.

Release.—The term *release*, in its popular and limited signification, is now used to denote the instrument whereby

[1] Seizin, in the common law, may be defined as the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. See Towle v. Ayer, 8 N. H. 58.

the interest conveyed by a mortgage is reconveyed to the owner of the fee, or where a lien is surrendered, and it is also used generally to designate the conveyance of a right of any kind to a person in possession, as where a married woman releases her inchoate right of dower to a grantee of her husband, she having failed to join in the original deed. In England it obtains in a fourfold form, and is one of the most important of the common-law forms of conveyance.[1] In the United States, the technical principles relating to deeds of this character are wholly, or in a great measure, inapplicable, while the conveyance which corresponds to a release at common law is the popular quitclaim deed, the operative words of conveyance being the same in both deeds. If a release is used it is regarded as a substantive mode of conveyance.[2]

Where a deed remising and releasing premises contains a covenant of warranty of title, either general, or simply as against the claims of all persons claiming under the grantor only, and particularly if the *habendum* be to the grantee, his heirs, etc., it will not be a simple release, but a conveyance of the fee; and a title subsequently acquired by the grantor will inure to the grantee, unless it is derived from sale under an incumbrance assumed by the grantee.[3]

Confirmation.—The subject of *confirmation* has been several times alluded to in the course of this work, but mainly in treating of confirmations by the government of previously existing but inchoate rights to what would otherwise be public land.[4] Deeds of confirmation are also in use among individuals, and is that species of conveyance whereby an existing right or voidable estate is made sure and un-

[1] Under the English rules of conveyancing, in order to give effect to a deed of release it is first necessary to execute a lease (or bargain and sale for a year), which by force of the statute of uses puts the lessee or bargainee in possession, and being thus in possession, although by a mere fiction, the release, operating by way of enlargement of the estate, is effectual to transfer the entire title.

[2] Hall's Lessee v. Ashby, 9 Ohio, 96.

[3] People, ex rel., Weber v. Herbel, 96 Ill. 384.

[4] See p. 170, *supra*.

avoidable, or where a particular interest is increased. The appropriate technical words of confirmation are "ratify, approve and confirm," but "grant and convey" or similar terms will have the same effect.

Technical deeds of confirmation are not very generally employed at present, as a "quitclaim" is effective for almost every purpose which might be accomplished by the former. Frequently, however, recitals in deeds show them to be given in ratification or confirmation of previous acts, and to correct errors, irregularities or infirmities in former deeds, in which event they take effect by relation as of the date of the former act or deed, and the confirmatory words become material to interpret and explain the undisclosed intention or correct the irregularity of the former deed. Thus, where through inadvertence or mistake lands have been incorrectly described or parties have been improperly named, a confirmatory conveyance is made to cure the defect. Such deeds should, as rule, bear date the same as the defective deed, irrespective of the time they are actually given.

Surrender.—A *surrender* is defined as the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, the lesser estate being merged in the greater by mutual agreement,[1] and the term is applied both to the act and the instrument by which it is accomplished. It is directly opposite in its nature to release, which technically operates by the greater estate descending upon the lesser. The operative words of a conveyance of this nature are "surrender and yield up," but any form of words that indicates the intention of the parties will serve the same purpose, while a surrender is always implied when an estate incompatible with the existing estate is accepted.

Though books on conveyancing still continue to give ample forms for deeds of surrender, the quitclaim deed in common use has taken its place for most purposes; but it would seem that this is still the proper instrument for the relinquishment of leasehold interests, dower, etc. In deeds of surrender the

[1] 2 Bouv. Law Dict. 573; Coke, Litt. 337*b*.

special matter of inducement usually precedes the operative part of the deed; as, in case of leasehold, a recital of the lease, etc.

Assignment.—An *assignment* is a mode of conveyance applicable to any estate in lands whatever; but the term is usually employed to express the transfer of an equitable estate, an estate for life or years, a leasehold interest, or the interest held by a mortgagee, and as such will receive attention in other parts of the work. The operative words of conveyance are "assign, transfer and set over," but any other words evincing an intention to make an entire transfer are sufficient.[1]

An assignment by indorsement on a deed is entirely nugatory. Such a proceeding might, perhaps, vest in the assignee a right to the paper itself, but would not affect the title to the land. At best, it might, in equity, be considered as an executory contract, on proof of the facts connected with it, and as such entitle the assignee to a decree for specific performance, but it would not operate as a conveyance of the legal title.[2] The "liberality" of courts in some states has apparently produced a contrary rule,[3] but the foregoing is sustained by ample precedent as well as legal reason.

In its popular acceptation, in the United States, the term is used to distinguish a peculiar class of conveyances, usually resorted to by persons who find themselves in embarrassed circumstances or who are unable to satisfy the full demands of their creditors. In this sense they are classed as *voluntary*, or such as are made by the free act and deed of the assignor; and *involuntary* or statutory, or such as are made under compulsion of law and in furtherance of statutes of bankruptcy or insolvency. In all cases they imply a trust and the intervention of a trustee,[4] called an *assignee*, and

[1] Cruise, Dig., tit. 32, ch. V; 2 Hill, Abridg. 318; 2 Black. Com. 326.

[2] Lessee of Bentley v. DeForrest, 2 Ohio, 221; Linker v. Long, 64 N. C. 296.

[3] See Harlowe v. Hudgins, 84 Tex. 107, where an assignment endorsed upon a deed was held sufficient to vest title in the assignee.

[4] Cowles v. Rickett, 1 Iowa, 382; Dickson v. Rawson, 5 Ohio St. 218; Peck v. Merrill, 26 Vt. 686.

conveyances made directly to the beneficiaries, though for the same purpose, are not technically assignments,[1] and come under the provisions regulating ordinary deeds of transfer and sale.

In effect an assignment is an absolute conveyance by which both the legal and equitable estate becomes divested out of the grantor, and vested in the assignee, subject to the uses and trusts in favor of the creditors.[2]

Continued — Voluntary assignments.— The power to make an assignment for the benefit of creditors is not derived from any statutory enactment. Every debtor, whether solvent or insolvent, possesses, independent of statutory grant, the right to make any disposition of his property which does not interfere with the rights of others; in other words, to make any honest disposition of his property that he pleases. The right of assignment is clearly within the absolute dominion which the law empowers every man to exercise over his own. Statutory provisions concerning assignments are to be found in all the states, yet such statutes do not confer the right, but merely regulate its exercise, subjecting it, as in other transfers of property, to certain restrictions and limitations which experience has demonstrated to be wise and just, and affording to the assignee a protection against importunate creditors; but it is still the assignor's voluntary act, and not the act of the law. So, also, the power of the assignee is fixed by the instrument of assignment, which is at once the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. He distributes the proceeds and disposes of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. In all things the assignee is the representative of the as-

[1] Beach v. Beston, 47 Ill. 521; Keen v. Preston, 24 Ind. 395; Johnson v. McGraw, 11 Iowa, 151; Griffin v. Roger, 38 Pa. St. 382.

[2] Dwight v. Overton, 32 Tex. 390; Van Keuren v. McLaughlin, 21 N. J. Eq. 163; Driggs v. Davis, 21 N. Y. 574.

signor, and must be governed by the express terms of his trust.[1]

Continued—Formal requisites.— Though voluntary assignments are founded on common right, yet, to prevent fraud by the setting up of fictitious transfers claimed to have been made for the benefit of creditors, they must be attended with the prescribed legal formalities of the state where made, or where the property to be affected is situated; and unless executed in conformity with such laws are inoperative and void. By the instrument the debtor's property must be unconditionally and without restriction transferred to the assignee, with a general authority to him to receive, hold and dispose of it for the equal benefit of all the creditors, or in the order of preference, if any, provided for.[2]

The assignment should be executed with the same solemnities that characterize ordinary deeds for the conveyance of land, and be duly acknowledged before an authorized officer.[3]

No particular form of instrument is needed to constitute an assignment, and any valid transfer, intelligibly indicating the trusts, will suffice.[4] It is usual to set out the real estate conveyed, either in the body of the assignment or in a schedule thereto annexed, yet such is its force as a conveyance, that, when made in general terms, it passes all the property which the assignor then owns, either in possession or expectancy, and the omission to mention it in the inventory will not prevent the title from passing to the assignee.[5] If the instrument mentions specific property, without a clause of general conveyance, or even makes special exceptions, it will not, for that reason, be void, as the title to such withheld property may still be pursued by creditors, their remedies being neither hindered nor delayed;[6] and so long

[1] In re Lewis, 81 N. Y. 421; Pillsbury v. Kingon, 31 N. J. Eq. 619; Bank v. Willis, 7 W. Va. 31.

[2] McIntire v. Benson, 20 Ill. 500.

[3] Britton v. Lorentz, 45 N. Y. 51.

[4] Norton v. Kearney, 10 Wis. 443.

[5] Roseboom v. Mosher, 2 Denio (N. Y.) 61.

[6] Knight v. Waterman, 36 Pa. St. 258; Ingraham v. Grigg, 21 Miss. 22; Bates v. Ableman, 13 Wis. 664; Carpenter v. Underwood, 19 N. Y. 520.

as there is no reservation of some part of, or some right or interest in, the property actually conveyed, the assignment will be valid. The statutory requirements relate mainly to the acceptance of the trust by the assignee, filing of bond, etc.

Involuntary Assignments. — The laws of the several states with respect to insolvency do not, as a rule, contemplate involuntary, or forced assignments, by a debtor. Under the national constitution it is competent for congress to provide a uniform system of bankruptcy, and this it has several times assumed to do. At this writing (1900) a new bankrupt law has just gone into effect. In general, the bankrupt laws provide for compulsory assignments, the assignee acting in much the same manner with respect to the bankrupt's property as a receiver in chancery.

(c) *Conveyances by Delegated Authority.*

General principles — Powers. — A conveyance may be the direct act of the grantor, or it may result through some delegation of authority; in this latter event the person who executes the deed, or intermediary, is said to act under a *power*.

Powers are classed as *inherent* and *derivative*, the former being enjoyed by their possessors as of natural right, while the latter are such as are received from another. It is with the latter class only we now have to treat.

The person granting a power is called the *donor;* the person receiving it the *donee;* but while these terms are constantly employed in speaking of powers under the statute of uses, yet with respect to powers which are intended only as delegations of authority, and which practically create the relation of *principal* and *agent*, these latter terms are more generally used.

A very common example of a power is that presented by the delivery of a letter or warrant of attorney, authorizing the donee to do some act for and in the name of the donor, and the power thus conferred is what is usually styled a

naked power. This consists of a simple right or authority disconnected from any interest of the donee or agent in the subject-matter. But the power may consist of a right or authority to do some act, together with an interest in the subject on which the power is to be exercised; in which case it is said to be *coupled with an interest.* This occurs whenever the power or authority is connected with an interest in the thing itself actually vested in the agent; it must not, however, be merely an interest in that which is produced by the exercise of the power, but the power and the estate must be united or be co-existent.[1]

Powers which derive their operation through the statute of uses are authorizations which enable a person through the medium of the statute to dispose of an interest in real property, vested either in himself or another. They formerly constituted a very elaborate and intricate system in connection with uses and trusts, but modern legislation has greatly circumscribed their scope and confined their operation to a comparatively narrow channel. They are said to be *appendant* where the donee is authorized to exercise out of the estate limited to him the privilege of making grants; and *in gross* where the donee, who has an estate in the land, is given authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. Powers of *appointment* are those which go to create new estates, and are distinguished from powers of *revocation*, which are to divest or abridge an existing estate. Such powers are also divided into *general*, being those by which the donee is at liberty to appoint whomsoever he pleases, and *special*, or those in which the donee is restricted to an appointment to or among particular persons only. These powers may be created by deed, but are more generally raised by wills and testamentary writings.[2]

[1] Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548.

[2] Consult Cornish, Uses, 89; 4 Kent Com. 334; Wms. Real Prop. 245; 2 Wash. Real Prop. 634; and see p. 125, *ante.*

Powers of Attorney.—An instrument authorizing a person to act as the agent or attorney of the person executing same is technically called a *power of attorney*, and under authorizations of this kind many sales and conveyances of real property are accomplished. The donee of the power is designated as the *attorney in fact* of the donor. Powers of attorney are *general*, as when the agent is authorized to perform all necessary acts on behalf of the principal without limitation as to persons or things, or *special*, as when the power is limited to a particular act or series of acts, or for conveyance to particular persons. Where the power is to sell and convey land it must be in writing, and should possess the same requisites and formalities that appertain to a valid deed of conveyance.[1] In other words, it should be of equal dignity with the deed which is executed under it.

The instrument should recite the scope of the attorney's powers, but where it is deficient in some particular, others, which are necessary to the proper exercise of those expressly enumerated, will be implied as incidental thereto; as, where a power is expressly given to sell or lease the property of the principal, a power to contract to sell, as well as to convey and transfer, will be implied.[2]

The right of revocation is, as a rule, always reserved, but this is a right incident to the power given, and a principal may always revoke the authority of his agent at his mere pleasure without a reservation of such express right, or even though the power may be expressly declared to be irrevocable.[3] The only exceptions to this rule are when the authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, in all of which cases it is irrevocable, whether so expressed or not.[4]

[1] Fire Ins. Co. v. Doll, 35 Md. 89; Watson v. Sherman, 84 Ill. 263; Clark v. Graham, 6 Wheat. (U. S.) 577; Videau v. Griffin, 21 Cal. 389.

[2] Hemstreet v. Burdick, 90 Ill. 444.

[3] Walker v. Denison, 86 Ill. 142; Brown v. Pforr, 38 Cal. 550.

[4] Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548; Brown v. Pforr, 38 Cal. 550.

Continued — Construction. — Powers of attorney must be strictly construed; yet the rule does not require a construction that will defeat the manifest intention of the parties, and where such intention fairly appears from the language used, it must prevail;[1] but the authority cannot be extended beyond that which is clearly given in terms, or which is necessary and proper for carrying the authority given into full execution.[2] In this respect there is a marked difference as compared with powers of appointment created by deeds and wills, and powers introduced in connection with uses. In this latter class courts of equity have generally indulged in very liberal interpretations of words, and held many executions of such powers valid which would scarcely be allowed in the construction of words employed in the ordinary powers of attorney to sell land.

Continued—Revocations.—The recall of a power or authority conferred, or the vacating of an instrument previously made which grants a power, is called a *revocation.*[3] A power of attorney may be revoked in a variety of ways; as by the death of the principal, which operates as a revocation of every power uncoupled with an interest;[4] the marriage of the principal, the power having been given while he was a single man;[5] a conveyance by the principal of the subject-matter of the power before the agent has had an opportunity to dispose of it.[6] But the giving of a second power to another agent, without specially revoking the first, would not act as a revocation, and if either power is executed both will be exhausted.[7] In the foregoing instances the revoca-

[1] Hemstreet v. Burdick, 90 Ill. 444.

[2] Pool v. Potter, 63 Ill. 533. Thus, a power of attorney jointly executed by husband and wife for the sale of all their property, and in which the words "we," "ours," etc., are exclusively used, has been held insufficient to authorize a sale of the individual property of either, or at least in the absence of proof of the non-existence of joint property. Dodge v. Hopkins, 14 Wis. 630.

[3] 2 Bouv. Law Dict. 477.

[4] Blayton v. Merrett, 52 Miss. 353; Davis v. Savings Bank, 46 Vt. 728.

[5] Henderson v. Ford, 46 Tex. 627.

[6] Walker v. Denison, 86 Ill. 142.

[7] Cushman v. Glover, 11 Ill. 600.

tion occurs by operation of law. The principal may revoke by a special instrument of revocation, which, when recorded with the power, will operate as constructive notice of such fact.

It is important in sales of real property, effected by an attorney in fact, that sufficient evidence should always be provided as to the continuance of the power at the time of its exercise.

Execution of power by attorney.—Every deed executed by virtue and in pursuance of a power should bear upon its face a recital of authority; but deeds purporting to be the direct act of the grantor, though performed by an attorney in fact, are sufficiently formal if the execution and authentication affirmatively show the fact. The instrument is properly and legally executed if it bears the name (signature) and seal of the grantor, showing the procurement of the attorney, and purporting to be the act of the principal; but in making the acknowledgment, the attorney, being the person who executes the instrument, must acknowledge it; yet this he does as and for his principal.

As to what constitutes a proper signing there is some conflict of authority, the earlier cases holding it to be immaterial whether the attorney sign "A., attorney for B.," or "B., by his attorney, A.,"[1] on the theory that no particular form of words is necessary to bind the principal, provided the agency of the attorney appears from the deed itself.[2] It is now well established, however, that a conveyance made by an attorney in fact must be in the name of the principal, and purport to be executed by him;[3] and where the agent assumes either to grant or to execute, as where he signs and

[1] Jones v. Carter, 4 Hen. & M. 184; Montgomery v. Dorion, 7 N. H. 475; Wilkes v. Back, 2 East, 142.

[2] Magill v. Hinsdale, 6 Conn. 464; Worrall v. Munn, 1 Seld. 229.

[3] Pensonneau v. Bleakley, 14 Ill. 15; Elwell v. Shaw, 16 Mass. 42; Thurman v. Cameron, 24 Wend. (N. Y.) 90; Stinchfield v. Little, 1 Me. 231; Hale v. Woods, 10 N. H. 470. Less strictness is required where the instrument is not under seal, it being sufficient, in such case, if the intent to bind the principal appears in any part of the instrument. Townsend v. Hubbard, 4 Hill (N. Y.) 351.

seals, although describing his office, the deed will be void as to the principal.[1] It has also been held that signing the principal's name, but making no mention of the attorney, is not a valid execution.[2] It would seem, therefore, that in all conveyances by attorneys in fact, both the name of the principal and of the attorney must substantially appear in the execution of the deed, showing not only that the grant and seal are those of the principal, but by whom these acts are done;[3] and where there are two grantors, and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other and once for himself. One signature and a second seal is not equal to a second subscription.[4]

It is not necessary, however, that any particular form of words be used to render the instrument valid and binding upon the principal, provided it shows upon its face that it was intended to be executed as the deed of the principal, and that the seal affixed is his seal and not that of the attorney; and it has been held that where the deed is executed for several parties, it is not necessary to affix a separate and distinct seal for each, if it appears that the seal affixed was intended to be adopted as the seal of each of the parties.[5]

Powers of Sale.—At one time *powers of sale* were largely employed in this country in connection with mortgages and trust deeds in the nature of mortgages, the device being resorted to in order to avoid the expense and delay incident to a foreclosure in equity. Of late years the tendency has been to discourage the use of this class of powers and in many states their exercise has been prohibited.

[1] Fowler v. Shearer, 7 Mass. 14; State v. Jennings, 10 Ark. 428; McDonald v. Bear River Co., 13 Cal. 235. And this, even though in the body of the instrument it is stated that it is the agreement of the principal by his attorney, and that the principal covenants, etc., while in the testimonium clause it is alleged that A. B. (the agent) as the attorney of the principal, has set his hand and seal. Townsend v. Corning, 23 Wend. 435.

[2] Wood v. Goodrich, 6 Cush. 117.

[3] See 3 Wash. Real Prop. *573, and cases cited.

[4] Meagher v. Thompson, 49 Cal. 189.

[5] Townsend v. Hubbard, 4 Hill (N. Y.) 351.

Powers of this character are irrevocable, being coupled with an interest,[1] and are not affected by any subsequent disability of the donor,[2] or even by his death,[3] in the absence of any statutory rule to the contrary.

In the execution of a power of this kind a strict compliance with its essential terms is required,[4] but in matters necessary to a proper execution, concerning which no specific directions are given,[5] the donee may exercise his discretion provided that he acts with fairness and in good faith.[6]

Powers of appointment.— There is a further class of powers which do not come within the popular meaning of the term as used with reference to acts done by one as the agent or attorney of another. This class derives its origin and distinctive character from the application of the doctrines of the statute of uses, and is employed where lands are conveyed with an inferior estate to the donee and a right or power of disposal in such donee of the residue or fee. The right to make this disposal, or to designate the person to take the fee, is called a *power of appointment*, and the person taking under it is called the *appointee*.[7] Thus A by his last will may devise a life estate in land to B and then give to B the right to dispose of the fee by his own last will. This would be a general power of appointment in gross, as will be seen by the distinctions made in the opening paragraph of this section.[8]

Originally these matters were characterized by much subtlety and refinement; but as the doctrine of uses, out of which they grew, has been very greatly modified in the United States, the creation and execution of powers of this nature have become comparatively simple and easily under-

[1] Callaway v. Bank, 54 Ga. 441.

[2] Encking v. Simmons, 28 Wis. 272; Hall v. Bliss, 118 Mass. 554.

[3] Connors v. Holland, 113 Mass. 50; Bell v. Twilight, 22 N. H. 500; White v. Stephens, 77 Mo. 452.

[4] Thornburg v. Jones, 36 Mo. 514.

[5] As where the power prescribes notice of sale by publication but names no newspaper.

[6] Ingle v. Jones, 43 Iowa, 286; Briggs v. Briggs, 135 Mass. 306; Webber v. Curtis, 104 Ill. 309.

[7] See Coke, Litt. 271*b*, Tud. Lead. Cas. 264; 4 Kent Com. 334; 2 Wash. Real Prop. 637.

[8] See *ante*, p. 353.

stood. Powers of appointment may be created by deed, but are usually found in wills. No specific formula is necessary to their creation, and any words which indicate intention to reserve or give the power will ordinarily be allowed to have effect.

It sometimes becomes important to distinguish between the terms which create a power and those which would confer an interest in one; the difference being, so far as the party who ultimately derives title to the estate is concerned, that in the latter case he takes immediately from the donee of the power and interest, while in the former he would take from the grantor himself, the donee being only the medium through which the estate is transferred. The subject will be further examined and illustrated in the chapter on testamentary conveyances.

(d) *Conveyances in Trust.*

Nature and effect — Definition. — As previously stated,[1] that which in the law of real property now goes by the name of a *trust* was originally called a *use*, and has been defind as a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person touching the land, for which the beneficiary has no remedy save in chancery.[2] By a later definition it is described as a right of property held by one party for the benefit of another,[3] and consists of an equitable right, title or interest in the property distinct from its legal ownership.

The device originally grew out of the narrow policy of the common law, which prevented the free exercise of the power of alienation, and was used to convey the beneficial interest in property to persons who were incapable of holding the legal title, or in whom it was not desirable to have the legal title vest. With the gradual disuse of uses and trusts in some states, and their summary abolition in others, conveyances of this character have become comparatively infre-

[1] See *ante*, p. 118.

[2] 1 Lewin on Trusts, 13.

[3] Bouv. Law Dict., tit. Trusts.

quent, while in cases of passive trusts no estate or interest, legal or equitable, will vest in the trustee under the statutes of most of the states, but the beneficiary takes the entire legal estate of the same quality and duration, and subject to the same conditions, as his beneficial interest.[1]

If the instrument imposes on the trustee active duties with respect to the trust estate, such as to sell and convert into money, or to lease the same and collect the rents, pay taxes, etc., and to pay the net proceeds to the beneficiary, it creates an active trust which the statute does not execute; but if there is simply a conveyance to the trustee for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used.

Essentials of a trust.—We have seen that to every valid grant there must be a grantor, a grantee, and a thing granted; that the parties must possess legal capacity, that the subject matter must be capable of transfer, and that all of these incidents must affirmatively appear in the deed of conveyance. In a conveyance in trust this list is extended by the addition of a new element, to wit; there must be a *beneficiary*. An unbroken line of decisions firmly establishes the principle that a trust without a certain beneficiary who can claim its enforcement is void.[2] There is an apparent exception to the rule in the case of what is known as a "charitable" trust, and the court of chancery in England was wont to give effect to a trust which was designed as a gift for charitable purposes, although no beneficiary was named, under what was known as the doctrine of *cy pres*.[3] This was an attempt to substitute a general intent for a particular intent, even though the subject of the trust should be applied to a different purpose than that intended by the donor. But even this construction was only applied in the case of wills, or testamentary conveyances, and never

[1] Consult local statutes; this is the general statutory rule.

[2] Prichard v. Thompson, 95 N. Y. 76; Jacobs v. Miller, 50 Mich. 126.

[3] From the French and signifying, as near as.

with respect to deeds, and it is now denied any place in the jurisprudence of many of the states.

It is a further essential that the trust shall be for some purpose which the law will recognize and sanction, and if there are several trusts, some of which are legal and some illegal, but so connected as to constitute one entire scheme, all will be held invalid and the conveyance will fail.[1]

Creation of a trust.—No particular form of words is required to create a trust, the intent only being regarded by courts of equity;[2] yet the *habendum* usually makes a formal recital after the preliminary words "to have and to hold," etc., by continuing, "in trust nevertheless," or some similar expression. It is essential, however, that the nature and terms of the trust be explicitly declared, as well as the party for whose benefit it is raised, its extent, and the property covered or affected by it.[3] Certainty of expression in each of these details seems to be of prime importance; and if the language in respect to either is so vague, general or equivocal that any of the necessary elements of the trust is left in doubt it will fail.[4]

Where a trust is intended by a conveyance, but fails entirely, so that the grantee takes no estate in the land under the conveyance, it may nevertheless create in him a valid *power in trust*,[5] the legal title remaining in the grantor.[6]

Where the deed creates a valid trust the entire estate vests in the trustee, subject only to the execution of the trust, except as otherwise provided; and where the deed gives a power of sale to the trustee at the request and for the benefit of the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor which is capable of being transferred.[7] Where

[1] Manice v. Manice, 43 N. Y. 303.

[2] Fisher v. Field, 10 Johns. (N. Y.) 464.

[3] Cook v. Barr, 44 N. Y. 156; Jacobs v. Miller, 50 Mich. 126; Ruth v. Oberbrunner, 40 Wis. 238.

[4] Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; Dillaye v. Greenough, 45 N. Y. 438; McClellan v. McClellan, 65 Me. 506.

[5] Fellows v. Heermans, 4 Lans. (N. Y.) 230.

[6] This is now the general statutory doctrine.

[7] Marvin v. Smith, 46 N. Y. 571; Leonard v. Diamond, 31 Md. 536.

the legal title is vested in a trustee, nothing short of reconveyance can place the same back in the grantor or his heirs, but under certain circumstances such reconveyance may be presumed without direct proof of the fact.[1] Trust estates are subject to the same rules as legal estates in every case, dower excepted.[2]

Continued—Declaration of trust.—To establish a trust the evidence must all be in writing, and sufficient to show that there is a trust and what it is;[3] and where land has been conveyed by a deed absolute in form but designed simply as a holding in trust, the grantee may make a valid admission of the trust in a separate instrument.[4] Such instruments are known as *declarations of trust*, and, unless required by statute, need not be by deed, that is by a sealed instrument, but any writing subscribed by the trustee will be sufficient if it contain the requisite evidence.[5] Although it is not essential that the writing by which the trust is manifested and proven should be in any particular form, it is customary for the trustee to declare same in a formal document, reciting the matter of inducement, declaring the nature of the trust estate, and frequently covenanting against his own

[1] Kirkland v. Cox, 94 Ill. 400; reversing 81 Ill. 11; 80 Ill. 67.

[2] Danforth v. Lowry, 3 Haywood (N. C.) 68.

[3] Cook v. Barr, 44 N. Y. 156; Steere v. Steere, 5 Johns. Ch. 355; 1 Green. Cruise, 335. But this does not apply to resulting trusts, which may be established by parol. Faris v. Dunn, 7 Bush (Ky.) 276; McGinity v. McGinity, 63 Pa. St. 38.

[4] Elliott v. Armstrong, 2 Blackf. 198; McLaurie v. Partlow, 53 Ill. 340; Cook v. Barr, 44 N. Y. 156; Fast v. McPherson, 98 Ill. 496. Or by the pleadings in a chancery suit. Ibid.

[5] Cook v. Barr, 44 N. Y. 156. By the English statute of 29 Charles II., chapter 3, section 7, it was enacted "that all declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested or proven by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This statute provided, not for the creation of trusts, but for proving them, and is the basis of American statutes on the same subject. Though a trust of lands cannot be established by parol, yet if the trustee executes the trust he is bound by the act. Elliott v. Morris, 1 Harp. Eq. 281.

acts, and for conveyance to the beneficiary. But any untechnical writing, if it clearly expresses intention and sufficiently connects the trustee with the subject-matter of the trust, will answer all the requirements of law.

Resulting trusts.—It is a general rule of equity that if the purchase-money of land is paid by one person, but the deed, through any accident, mistake, fraud, or other circumstances contrary to the real intention of the parties, is taken in the name of another, the trust of the legal estate results to him who advanced the money.[1] A *resulting trust*, therefore, may be defined as a trust raised by implication of law and presumed to exist from the supposed intention of the parties. It is never created by agreement, but always results by implication of law from acts independent of agreement,[2] and there can be no resulting trust where the use is expressly limited to the grantee in a deed.[3]

In the case of trusts resulting by operation of law, an important exception is made to the rule which provides that a trust in land can only be established by some writing duly signed. This exceptiou is made from the necessities of the case, and a trust of this character is permitted to be established by parol.[4]

Removal or substitution of trustees.—Where a trustee is dead, the trust being still alive and unexecuted, a court of equity will carry it out, if necessary, through its own officers and agents,[5] and may appoint a new trustee;[6] and it seems that in some states, even where the trust deed contains a

[1] Case v. Codding, 38 Cal. 191; Frederick v. Haas, 5 Nev. 389; Flemming v. McHale, 47 Ill. 282; Dryden v. Hanway, 31 Md. 254; Mallory v. Mallory, 5 Bush (Ky.) 464; Johnson v. Quarrels, 46 Mo. 423; Nixon's Appeal, 63 Pa. St. 279, Campbell v. Campbell, 21 Mich. 438.

[2] Sheldon v. Harding, 44 Ill. 68; Stevenson v. Thompson, 13 Ill. 186.

[3] Donlin v. Bradley, 119 Ill. 412.

[4] Kane v. O'Conners, 78 Va. 76; Wits v. Horney, 59 Md. 584; McCartney v. Bostwick, 32 N. Y. 59; Pritchard v. Brown, 4 N. H. 397.

[5] Batesville Institute v. Kauffman, 18 Wall. 120. It is a rule in equity that a trust shall never fail for want of a trustee. Buchan v. Hart, 31 Tex. 647.

[6] Curtis v. Smith, 60 Barb. 9; Hunter v. Vaughan, 24 Gratt (Va.) 400.

power of appointment, in the event of the death of the trustee without executing the trust, the *cestui que trust* cannot appoint a new trustee, but the exercise of this right devolves exclusively on a court of chancery.[1] A trustee may always be removed in the discretion of the court upon proper cause shown.[2]

Resignation—Refusal to act.— A trustee, having once accepted, cannot divest himself of the obligation to perform the duties of his trust, without an order of the court, or the consent of all the *cestuis que trust;*[3] and where he refuses to act, equity will compel him to do so, or may appoint a suitable person in his place.[4]

(e) *Conveyances by Way of Pledge.*

Historical development.— It would seem that the common law early recognized two kinds of landed security known respectively as *vivum vadium* and *mortuum vadium*. The former consisted of a feoffment to the creditor and his heirs until out of the rents and profits of the land the debt had been satisfied. The creditor in such case took actual possession of the estate, and received the rents and applied them to the liquidation of the debt; when it was satisfied or paid the debtor might re-enter. This species of pledge is said to have been called *vivum vadium*, or living pledge, because neither the debt nor estate was lost. It is said, however, that this mode of security was not very general, and in time was superseded by the *mortuum vadium*, or dead pledge, so called because on breach of condition the estate was rendered indefeasible in the pledgee and absolutely lost or dead to the pledgor. In the Norman-

[1] Guion v. Pickett, 42 Miss. 77. As a general rule a court of chancery has jurisdiction to control the exercise of the power of appointment when vested in an individual, so far, at least, as to prevent an abuse of discretion. Bailey v. Bailey, 2 Del. Ch. 95.

[2] Attorney-General v. Garrison, 101 Mass. 223; Ketchum v. Railroad Co., 2 Woods, 532; Scott v. Rand, 118 Mass. 215.

[3] Thatcher v. Candee, 4 Abb. App. Dec. (N. Y.) 387.

[4] Sargent v. Howe, 21 Ill. 148; Wilson v. Spring, 64 Ill. 14. A successor in trust is frequently appointed in a trust deed in case of the inability or refusal of the trustee to act.

French of that day this species of conveyance acquired the name of *mort gage* and this name has ever since been retained.

This latter mode of pledging lands was attended with great inconvenience and much hardship. If the money was not paid on the very day named in the deed, the lands became absolutely forfeited; nor would any subsequent tender of the money avail the debtor. Notwithstanding the obvious injustice of this doctrine, the courts of common law held that all the maxims respecting the breach of a condition were strictly applicable to this kind of conveyance, and refused to allow the smallest degree of liberality in their construction. Upon the execution of such a mortgage the legal estate immediately vested in the grantee, technically called the *mortgagee*, subject to be defeated by the performance of the condition. The time appointed for the payment of the money, to secure which the mortgage was given, became known as the "law day;"[1] and if tender or payment was not made at that time according to condition, the estate became absolute and indefeasible in the mortgagee.

But in the contemplation of equity, the absolute forfeiture of an estate on breach of the condition was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was founded. Equity, therefore, early interposed to moderate the severity of the common law, and, leaving the forfeiture to its legal consequences, operated on the conscience of the mortgagee—acting *in personam* and not *in rem*—and declared it unreasonable that he should retain for his own benefit what was intended merely as a pledge. To effect the object of its interference the court of chancery then adjudged that a condition of this kind was in the nature of a penalty, against which equity ought to relieve; that all the creditor could in justice and conscience be entitled to was his principal, interest and costs; and established it as a ruling principle, that

[1] Because after default the legal rights of the mortgagor were extinguished.

although the condition was not strictly performed, by which the estate was forfeited at law, yet if the debtor, called the *mortgagor*, paid the money borrowed and the interest thereon within a reasonable time, he should be entitled to call upon the mortgagee for a reconveyance of his lands.[1]

The right thus accorded to the mortgagor was called an *equity of redemption* and by it the time of payment might be indefinitely extended at the pleasure of the debtor. Therefore it became necessary to confer upon the creditor some corresponding right and this was accomplished by permitting him, where he could not obtain the payment of his debt after due notice, to file a bill in chancery praying that the mortgagor might be ordered to pay the amount due by "a short day" to be fixed by the court and in default that he be forclosed of all right and equity of redemption; that is, no longer be protected against the forfeiture, or strict legal consequences of the agreement. This procedure which, in its essential details, has remained to this day, was found to be long and expensive and as a consequence a new method of summary action was devised by a recourse to the doctrine powers. It then became the practice to insert in the mortgage special provisions authorizing the mortgagee, in case of default in any of the conditions, to sell the mortgaged property and out of the proceeds of the sale to reimburse himself for his debt and interest. This provision, known as a *power of sale*, was almost invariably inserted in instruments intended as security only and in time the sale under the power practically superseded the older practice of foreclosure in equity. This practice prevailed very extensively in the United States for many years, but by reason of the hardships which its exercise frequently entailed, it has been prohibited in many states and the whole subject of foreclosure given to the courts as a part of their equity jurisdiction.

In the United States the subject of mortgages and the method of foreclosure is now very generally regulated by statute.

[1] See Cruise, Dig., tit. 15, ch. 1; 2 Story, Eq. Jur., ch. 27; 2 Black. Com., ch. 10.

Modern doctrine of mortgages.—Notwithstanding that a mortgage in form still purports to convey a present legal estate to the mortgagee, liable to be defeated only by the performance of stipulated conditions, yet the modern doctrine is that it is but a lien on land by way of security for a debt, and that the legal title remains in the mortgagor subject only to the lien;[1] that the right a mortgagee has to hold the mortgaged premises as security for his debt is not an estate in the land, and passes only by an assignment of the debt.[2] The estate remaining in the mortgagor after the "law day"[3] has passed, or at any time before foreclosure, is still popularly, but erroneously, called an "equity of redemption," retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity;[4] but the words "redemption" and "equity of redemption" are all that survive, the ideas they once represented having long since become obsolete. The same is the case with reference to the word "forfeiture," so often used in connection with this subject; there is now no forfeiture of a mortgaged estate, and the right of the mortgagor is the same the day after default as it was the day before. Where land has been sold under foreclosure proceedings and a deed has issued to the purchaser the estate of the mortgagor may be said to have been forfeited, but this is not the sense in which the term was long used in respect of mortgages.

The term "mortgage" now has a technical significance in law, and when used in legal proceedings as descriptive of a

[1] Vason v. Ball, 56 Ga. 268; Wing v. Cooper, 37 Vt. 169; Fletcher v. Holms, 32 Ind. 497; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hilderbrand, 46 Mo. 284; Astor v. Hoyt, 5 Wend. 602.

[2] Mack v. Witzler, 39 Cal. 247.

[3] This expression, as previously explained, once very distinctly marked the time when all legal rights were lost by the mortgagor's default, but now there is no such time until foreclosure by a judicial sentence or under a power of sale.

[4] Croft v. Bunster, 9 Wis. 503; Drayton v. Marshall, 1 Rice's Eq. (S. C.) 373; Stewart v. Barrow, 7 Bush (Ky.), 368. It would seem that this doctrine still prevails in a few states, and in a modified form in others; as, after condition broken or default, the legal title is held to pass to the mortgagee. Johnson v. Houston, 47 Mo. 227; Fuller v. Eddy, 49 Vt. 11.

written instrument must be taken and construed according to its technical legal import. In this respect a right of redemption is an essential ingredient and is always implied, even though no defeasance is expressed in the instrument itself.[1]

Neither can there be a mortgage without a debt, to secure which the mortgage is given, but it is not necessary that there should be an express promise of the mortgagor to pay the debt nor that it should assume any particular form.[2] A promise to pay may be implied from the transaction and parol evidence may be resorted to, in proper cases, for the purpose of construing the instrument and fixing the rights of the parties.

Different forms of mortgage.—A mortgage, in its original form, was effected by the employment of two contemporaneous deeds, one of which purported to be an absolute conveyance of the land in question while the other, called a "deed of defeasance" provided for a reconveyance to the mortgagor if he, on a specified day, repaid the sum for which the mortgage was given to secure. In time the two deeds were merged into one the instrument taking the form of an absolute conveyance with a clause of defeasance added, and this is much the form which it retains today. But the principle involved in a mortgage has been extended by the courts until form has become of little moment and as a result we now have a number of different kinds.

Conveyances for the security of a debt or the protection of creditors may be divided into three classes. The first includes mortgages properly so called, being conveyances from debtor to creditor, expressed to be by way of a pledge or security for the payment of the indebtedness or for the in-

[1] Walton v. Cody, 1 Wis. 420; Peugh v. Davis, 96 U. S. 332; Wing v. Cooper, 37 Vt. 169; Bearss v. Ford, 108 Ill. 16. "Once a mortgage always a mortgage" is a universal rule in equity, and no agreement in a mortgage to change it into an absolute conveyance upon any condition or event whatever will be allowed to prevail. Clark v. Henry, 2 Cow. 324.

[2] Helberg v. Schumann, 150 Ill. 12.

demnification of the grantee against a particular loss, and containing a clause of defeasance upon the performance of the stipulated conditions.[1] To this division also belongs that class of mortgage securities technically known as "trust deeds," wherein the debts are specified and the creditors named or described, but because of their large number, or to allow greater freedom in the transfer of the evidences of the indebtedness, or from other circumstances making a conveyance directly to them less convenient, the deed is made to a mortgagee *in trust*, the creditors standing in the position of *cestui que trust*.[2]

The second division consists of conveyances which are absolute in form, but, being intended as security for debt only, courts of equity will give effect to the intention of the parties, whatever be the form of the conveyance, and treat same as a mortgage, except as against the rights of *bona fide* purchasers or other intervening equities.[3] These are known as *equitable mortgages*. There is a further form of equitable mortgage still recognized in England, but which for many years has been denied effect in America, created by a simple deposit of title deeds. That is, a debtor places in the hands of his creditor, or of one who advances money to him, the muniments of his title, and this is sufficient to clothe the creditor with the rights of a mortgagee. In this form there is, or may be, no writing whatever, but the English courts have construed the deposit as evidence of an agreement to mortgage which equity will carry into execution.

The third division contemplates all deeds of trust or as-

[1] Vason v. Ball, 56 Ga. 268. It is not necessary that there should be a clause of defeasance where the instrument shows that it is one of security but in most orderly drawn mortgages it is customary to insert same.

[2] Hurley v. Estes, 6 Neb. 386; Turner v. Watkins, 31 Ark. 429. A trust deed executed to secure a debt does not vest in the trustee the legal title to the land, which can only be taken away from the grantor by foreclosure or other legal process in substantial accord with the deed. Ingle v. Culbertson, 43 Iowa, 265.

[3] Sweet v. Mitchell, 15 Wis. 641; French v. Burns, 35 Conn. 359; Shays v. Norton, 48 Ill. 100.

signments for the payment of creditors generally,[1] the mortgagee in such case representing the rights of the mortgagor only.[2]

Mortgages may assume a variety of shapes and their identity become almost concealed, but the fact of security is always sufficient to furnish an indication of their true character.[3]

The equity of redemption.—The estate remaining in the mortgagor before foreclosure is popularly, but erroneously, called an equity of redemption. Although a misnomer, it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy; the lien of judgments; may be sold on execution; and may be the subject of mortgage and sale, the same as any other estate in lands; while the mortgagee has but a lien upon the land as a security for his debt, and the same is not liable to his debts, or subject to any of the incidents of an estate in lands.[4] The mortagagor retains and is possessed of an estate in the land

[1] Bank v. Lanahan, 45 Md. 396.

[2] Spackman v. Ott, 65 Pa. St. 131.

[3] A penal bond to reconvey lands has been held to be a mortgage. Reynolds v. Scott, Brayt. (Vt.) 75. So of a deed with a bond for reconveyance. Wing v. Cooper, 37 Vt. 199. But otherwise upon facts stated. Rich v. Doane, 35 Vt. 125. So, also, of a deed with a stipulation that title shall not vest until the purchase-money is paid. Pugh v. Holt, 27 Miss. 461. And, generally, any conveyance expressed to be to secure a payment. Cowles v. Marble, 37 Mich. 158; Bearss v. Ford, 108 Ill. 16; Parks v. Hall, 2 Pick. (Mass.) 211.

[4] Odell v. Montross, 68 N. Y. 499; 2 Wash. Real Prop. 152; Gorham v. Arnold, 22 Mich. 247; White v. Rittenmeyer, 30 Iowa, 268. This is the general doctrine; yet in some states it is still held that, after the expiration of the law day, the mortgagor, or one occupying his position, is considered as tenant by sufferance of the mortgagee, and liable to be evicted without notice to quit. The mortgagee in such case has a right of entry, which he may peaceably assert without notice and without action; or he may, with or without notice to quit, bring ejectment, and may recover possession of the land and damages for use and occupation after notice to quit, and if no notice, then after the service of the writ; and this either against the mortgagor or his assignee. Mason v. Gray, 36 Vt. 311; Collame v. Langdon, 29 Vt. 32; Welsh v. Phillips, 54 Ala. 39.

in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned, there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a special interest by way of lien, the respective parts, when united, constituting one title.[1] The possession of the mortgaged premises in no way affects the right of the one to redeem or of the other to foreclose.[2] These relations continue until the execution and delivery of a deed in pursuance of a decree of foreclosure or the execution of a power of sale.

Mortgages proper.— A mortgage may be made by an absolute conveyance with a defeasance back, but this form has never been in general use in the United States, and is now obsolete. The class of conveyances to which this name is technically applied consists of an instrument in form purporting to convey a present estate to the mortgagee, liable to be defeated by the performance of stipulated conditions,[3] and is always between the principals to the transaction.

Trust deeds.— Trust deeds in the nature of a mortgage were once in very common use, but the sweeping changes produced by the abolition of much of the common-law doctrine of uses and trusts and the limitation of powers have now confined them to a few states, and even in those states, under the influence of recent legislation, mortgages are to some extent taking their place. In general effect a trust deed is the same as a mortgage, and like a mortgage is a mere security for the payment of money, or for the performance of certain undertakings by the grantor. It is a mere

[1] Odell v. Montross, 68 N. Y. 499.

[2] Parsons v. Noggle, 23 Minn. 328.

[3] It is the universal custom to witness the obligation of payment by a bond or promissory note, the mortgage simply stipulating that, if the money be paid by the day named, the mortgage as well as the obligation shall be void; but it may often happen that no separate obligation is taken, and the absence of a bond or other express obligation to pay the money will not make the instrument any less effectual as a mortgage, provided, of course, there is a valid subsisting debt.

incident to the debt which it secures, and upon which it depends.[1] The same general principles are applicable to this class of conveyances as to other deeds intended only as security, and the chief feature which distinguishes them from mortgages is, that here the conveyance is not made to the creditor direct, but to a trustee who holds the lien for the benefit of the owner or legal holder of the note, or other evidence of the indebtedness, which, if negotiable, passes from hand to hand as other commercial paper, the incident of the lien following the note to the hands of the last indorsee, who, on default, may call upon the trustee to execute the trust according to its terms.

The grantor in a trust deed, in declaring the trust, may mold and give it any shape he chooses, and he may provide for the appointment of a successor or successors to the trustee upon such terms as he may choose to impose; but when imposed the terms must be pursued, to render the acts of the successor valid. It is alone by the force of the powers delegated by the deed that the trustee can perform any act with reference to the trust property, and in executing those powers he must pursue them or his acts will be void.[2]

Equitable mortgages.—It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money; for the court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties.[3] Such a deed carries with it

[1] Life Insurance Co. v. White, 106 Ill. 67.

[2] Equitable Trust Co. v. Fisher, 106 Ill. 189; Ellis v. Railroad Co., 107 Mass. 12.

[3] Peugh v. Davis, 96 U. S 332; Klein v. McNamara, 54 Miss. 90; Carr v. Carr, 52 N. Y. 251; Shays v. Norton, 48 Ill. 100; Turner v. Kerr, 44 Mo. 429; Moore v. Wade, 8 Kan. 380; Kerr v. Agard, 24 Wis. 378. The rule that parol proof is admissible to show that a conveyance of real estate, absolute upon its face, was intended to be a mortgage or security merely, is recognized and applied for the reason that such evidence is received not to contradict an instrument of writing, but to prove an equity superior to it. Sanders v. Stewart, 7 Nev. 200; Wilcox v. Bates, 26 Wis. 465.

all the incidents of a mortgage; and the rights and obligations of the parties to the instrument are the same as if it had been subject to a defeasance expressed in the body thereof, or executed simultaneously with it.[1]

It is a further established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has in a court of equity a right to redeem the property upon payment of the loan; and this right cannot be waived or abandoned by any stipulation of the parties at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.[2]

But where land is conveyed in fee, by a deed absolute in form, and parol evidence is resorted to for the purpose of showing that it was intended as a mortgage, such evidence must be clear, certain and unequivocal, and where there is a substantial conflict in the proofs, the legal presumption that the deed is what on its face it purports to be must prevail.[3] In doubtful cases, however, courts usually lean in favor of such a construction as shall make the transaction a mortgage and not a sale.[4]

The legal import of an absolute deed is that it conveys the fee,[5] and any contradiction of its apparent effect must arise

[1] Odell v. Montrose, 68 N. Y. 499.

[2] Peugh v. Davis, 96 U. S. 332; Clark v. Henry, 2 Cow. 324. And see Walton v. Cody, 1 Wis. 420; Bearss v. Ford, 108 Ill. 16.

[3] Keithley v. Wood, 151 Ill. 566; Winston v. Burnell, 44 Kan. 367.

[4] Cosby v. Buchanan, 81 Ala. 574; O'Neill v. Capelle, 62 Mo. 202; Trucks v. Lindsey, 18 Iowa, 504.

[5] A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations, and when so barred that an action for affirmative relief cannot be maintained thereon, it cannot be interposed as a defense to an action by the grantee to recover possession of the property. Richards v. Crawford, 50 Iowa, 494. See Edwards v. Trumbull, 50 Pa. St. 509; Shaw v. Wiltshire, 65 Me. 485. This result always follows if the instrument be recorded in the record of deeds and not of mortgages. Brown v. Dean, 3 Wend. (N. Y.) 208.

from extrinsic evidence. The record rarely furnishes any clue to the true character of this class of conveyances, the facts governing their equitable nature resting entirely in parol; hence subsequent purchasers for value, without notice, will be protected by the record;[1] and where one in possession of land, under a conveyance absolute on its face, sells the same, his grantee, without notice that his vendor's deed was but a mortgage, will hold the property free from any equity of redemption:[2] and even though a court of equity afterwards decides that the conveyance was only a mortgage, and the mortgagor was entitled to his equity of redemption, the title to the property will not be disturbed, but judgment *in personam* will be given against the mortgagee for the amount equitably due by him to the mortgagor.[3]

Where a lien on land is expressly reserved in the deed conveying same, which is duly recorded, a clear equitable mortgage is created of which every one is bound to take notice;[4] but something more than a mere reservation of a right to purchase, or covenant to reconvey, must be shown in order to convert a deed absolute on its face into a mortgage.[5] There is no positive rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The owner of lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give the

[1] It is the settled policy of the law to give security to, and confidence in, titles to the landed estates of the country which appear of record to be good. McVey v. McQuality, 97 Ill. 93.

[2] Jenkins v. Rosenburg, 105 Ill. 157.

[3] Baugher v. Merryman, 32 Md. 186; Jackson v. McChesney, 7 Cow. 360; Grimstone v. Carter, 3 Paige, 421.

[4] Davis v. Hamilton, 50 Miss. 213; Armentrout's Ex'r v. Gibbons, 30 Gratt. (Va.) 652; Dingley v. Bank, 57 Cal. 467. As where a deed contains a stipulation that no title shall vest until the purchase-money has been paid (Pugh v. Holt, 27 Miss. 461; Austin v. Downer, 25 Vt. 558), or that the deed shall be absolute on the payment of certain notes, but in default thereof to be void (Bank v. Drummond, 5 Mass. 321). So if it be for the performance of any other duty, such as maintenance of the grantor during life, etc. Lanfair v. Lanfair, 18 Pick. (Mass.) 299.

[5] But see Peterson v. Clark, 15 Johns. (N. Y.) 205.

vendor the right to repurchase upon specified terms. Such a contract is not opposed to public policy, nor is it in any sense illegal.[1]

Equitable mortgages arising from the deposit of title deeds are not generally recognized,[2] and the doctrine cannot be said to prevail in this country.

Vendor's liens.—It has long been settled that the vendor of real estate, notwithstanding he has conveyed the legal title, has a lien on such estate for the unpaid purchase-money while it remains in the hands of the vendee, or volunteers, or purchasers with notice. This, however, applies mainly to implied liens; for where there is a distinct reservation of such lien upon the face of the deed, it has been held to constitute a specific charge upon the land, as valid and effectual as a deed of trust or mortgage;[3] and further, that the lien being set forth in the very first link of the vendee's chain of title, purchasers from him have just as much notice of it as they would have had of a lien on the land by mortgage or trust deed.[4]

Statutory forms.—As in case of deeds, statutory forms for mortgages are now prescribed in many states, but like deeds, from their meagerness of detail, have not, in many localities, come into very general use. The statutory words of conveyance and pledge are "mortgage and warrant.' The word "mortgages" is sufficient, under the statute, to create a mortgage in fee, while the addition of the words "and warrants" carries the legal import and effect of full covenants of seizin, right to convey, freedom from incumbrances, quiet enjoyment and general warranty.

Purchase-money mortgages.—A mortgage for the whole or a part of the purchase-money of the mortgaged property

[1] Hanford v. Blessing, 80 Ill. 188; Henley v. Hotaling, 41 Cal. 22; Glover v. Payn, 19 Wend. 518.

[2] Probasco v. Johnson, 2 Disney (Ohio), 96. The registry of a mortgage is a substitute for the deposit of the title deeds. Johnson v. Stagg, 2 Johns. 510.

[3] Armentrout's Ex'rs v. Gibbons 30 Gratt. (Va.) 632; Carpenter v Mitchell, 54 Ill. 126.

[4] Patton v. Hoge, 22 Gratt. (Va.) 443; Hines v. Perkins, 2 Heisk (Tenn.) 395; Coles v. Withers, 10 Reporter, 475.

stands upon a somewhat different footing from other conveyances by way of security. The peculiar qualities of a purchase-money mortgage are derived from statutes, under which it becomes a lien upon the entire estate of the mortgagor in the land, freed from any contingent claim of the wife, whether she be a party to the mortgage or not;[1] neither will she be a necessary party to a suit for foreclosure of a purchase-money mortgage, in the execution of which she had not joined, if such suit be brought in the life-time of the husband.[2]

Mortgages of the homestead.— The jealous care with which the law guards the homestead is never more fully exemplified than in the safeguards and restraints which it has placed upon all attempts to incumber it. In some states no valid mortgage of the homestead can be effected;[3] in a majority of the others such mortgage is effectual, only when there has been a special release and waiver of the right;[4] while in all the states, the free and voluntary assent of the wife, the mortgagor being a married man, is a condition precedent to the vesting of the lien.[5] Where the statute prescribes formalities relative to acknowledgment, such formalities become matters of substance, and their due observance is in all cases necessary;[6] but where no particular mode is prescribed, any joint action, properly acknowledged, will probably satisfy the requirement of the voluntary signature and assent of the wife.[7]

[1] Fletcher v. Holmes, 32 Ind. 497; Amphlet v. Hibbard, 29 Mich. 298; Thompson v. Lyman, 28 Wis. 266.

[2] Fletcher v. Holmes, 32 Ind. 497.

[3] Van Wickle v. Landry, 29 La. Ann. 330. And see Moughon v. Masterson, 59 Ga. 835; Campbell v. Elliott, 52 Tex. 151.

[4] Trustees v. Beale, 98 Ill. 248; Browning v. Harriss, 99 Ill. 456; Balkum v. Wood, 58 Ala. 642.

[5] Long v. Mostyn, 65 Ala. 543; Anderson v. Culbert, 55 Iowa, 233; Griffin v. Proctor, 14 Bush (Ky.) 571; Sherrid v. Southwick, 43 Mich. 515; Chambers v. Cox, 23 Kan. 393.

[6] Mash v. Russell, 1 Lea (Tenn.) 543; Balkum v. Wood, 58 Ala. 642; Warner v. Crosby, 89 Ill. 320. The fact that the deed recites a waiver does not help a defective acknowledgment. Best v. Gholson, 89 Ill. 465.

[7] Forsyth v. Preer, 62 Ala. 443. Local statutes must decide these matters; the laws and decisions of other states shed but little light on questions of this character.

The only exception to the rule above stated is, when the mortgage is given to secure all or a portion of the unpaid purchase-money, and in this case they all yield to the superior equity of the vendor's lien.[1]

Mortgage of after-acquired property.— As to the effect of deeds and mortgages of property to which the grantor or mortgagor has no present legal title, and which contain no covenants or other words creating an estoppel, there seems to be much diversity of judicial opinion, though the authorities are in the main harmonious in declaring equitable interests and estates to be proper subjects of conveyance by mortgage.[2]

The question frequently arises in regard to mortgages of incipient or inchoate rights under the United States land laws, and such mortgages have usually been upheld by the state courts, particularly when the transaction was shown to be one of good faith;[3] and, when congress has imposed no positive restrictions, the right is usually accorded to one rightfully in possession of the soil to make any valid contract concerning the title to same predicated upon the hypothesis that he may thereafter lawfully acquire it.[4]

So, too, where a railroad company made a mortgage on the property "then belonging to or thereafter to be acquired" by said company, with covenants for further reasonable and necessary conveyances as to subsequently acquired property, it was held that the mortgage became a valid lien upon any interest in real as well as personal estate subsequently acquired by the company for the use of its road, even superior to a vendor's lien for the purchase-money of the lands.[5]

[1] Fletcher v. Holmes, 32 Ind. 497; Amphlet v. Hibbard, 29 Mich. 298; Thompson v. Lyman, 28 Wis. 266.

[2] Bank of Greensboro v. Clapp, 76 N. C. 482.

[3] Woodbury v. Dorman, 15 Minn. 338; Wallace v. Wilson, 30 Mo. 335; Clark v. Baker, 14 Cal. 615; Reasoner v. Markley, 25 Kan. 635.

[4] Lamb v. Davenport, 18 Wall. 307.

[5] Pierce v. Milwaukee, etc. R. R. Co., 24 Wis. 551. And see Morrill v. Noyes, 56 Me. 458. Such mortgages form an exception to the general rule that property not in existence cannot be conveyed.

Courts of equity will enforce specific execution of contracts and give relief in numerous cases of agreements relating to lands and things in action, or to contingent interests or expectancies, upon the maxim that equity considers that done which, being agreed to be done, ought to be done;[1] and, in furtherance of this principle, where no rule of law is infringed, and the rights of third persons are not prejudiced, will, in proper cases, give effect to mortgages of subsequently acquired property.[2]

Effect of informality in mortgages.— Mortgages, or conveyances by way of security in the nature of mortgages, are seldom void for informality unless the informality or omission goes to the groundwork of the instrument; and a mortgage or trust deed otherwise complete, but lacking in some formal particular, though it may be denied legal effect, will be enforced in equity as an equitable mortgage, and this protection will extend to the assignee as well as to the original mortgagee.[3] This rule has been held to apply in case of a trust deed which omitted the name of the trustee;[4] and to a mortgage which did not express to be sealed;[5] and where the seal had been omitted;[6] where the instrument was imperfectly witnessed, as where there was but one witness, and the statute required two;[7] to imperfectly acknowledge instruments;[8] and even to the want of an acknowledgment.[9]

Whenever a mortgage is sufficient as between the parties it will affect all third parties who have actual knowledge or notice of its existence,[10] and purchasers with such notice will

[1] Sillers v. Lester, 48 Miss. 513; Stevens v. Railroad Co., 45 How. (N. Y. Pr.) 104.

[2] Beal v. White, 94 U. S. 382; Rice v. Kelso, 57 Iowa, 115.

[3] McQuie v. Peay, 58 Mo. 56; McClurg v. Phillips, 49 Mo. 315.

[4] McQuie v. Peay, 58 Mo. 56.

[5] Jones v. Brewer, 58 Me. 210.

[6] Harrington v. Fortner, 58 Mo. 468; Van Riswick v. Goodhue, 50 Md. 57.

[7] Gardner v. Moore, 51 Ga. 268; Sanborn v. Robinson, 54 N. H. 239.

[8] Haskill v. Sevier, 25 Ark. 152; Zeigler v. Hughes, 55 Ill. 288.

[9] Black v. Gregg, 58 Mo. 565.

[10] Gardner v. Moore, 51 Ga. 268; Sanborn v. Robinson, 54 N. H. 239; Wilson v. Reuter, 29 Iowa, 176.

take subject to the equities created by such defective mortgage.[1]

Covenants in mortgages.—As mortgages are now drawn, personal covenants are not usually inserted; but whenever they are inserted they have the same operation as in deeds of bargain and sale. The words "grant, bargain and sell" are sufficient to create an estoppel, and any subsequent interest the mortgagor may acquire in and to the mortgaged premises will pass by the mortgage or any sale that may be made pursuant to its terms.[2]

It is a rule, however, in ordinary cases of foreclosure, that the title ordered to be sold is only the title which was held by the mortgagor at the date of the mortgage;[3] and when a mortgage containing no covenant of warranty has been foreclosed, and the relation of mortgagor and mortgagee extinguished by a sale of the mortgaged premises, the former is under no duty to protect the title of the purchaser, nor is he precluded from subsequently acquiring and claiming under an outstanding and paramount title.[4] If the premises bring enough to satisfy the mortgage debt it would be inequitable to allow the purchaser to claim an interest subsequently acquired by the mortgagor, which he did not purchase and which was no part of the consideration of the sale. If there is a deficiency, that becomes a personal charge against the party bound to pay the debt, in favor of the creditor. Different considerations may apply where the mortgage contains covenants of warranty. In that case it has been held the consideration paid would represent the value of the land as warranted, and the mortgagor would be estopped from setting up an after-acquired title, against which he covenanted in the mortgage.[5]

Effect of special covenants.—In addition to the ordinary covenants of title and warranty, a series of special covenants

[1] Gardner v. Moore, 51 Ga. 268.

[2] Gibbons v. Hoag, 95 Ill. 45; Teft v. Munson, 57 N. Y. 97.

[3] Kreichbaum v. Melton, 49 Cal. 51.

[4] Jackson v. Little, 56 N. Y. 108.

[5] Jackson v. Littell, 56 N. Y. 108. And see Vallejo Land Asso. v. Viera, 48 Cal. 572.

are often inserted in mortgages which do not directly affect title. These covenants are sometimes annexed to conditions and stipulations, but may be separate from them and from the subject to which the stipulations allude. Of this nature is the covenant to keep the mortgaged premises insured for the benefit of the mortgagee. Such a covenant creates a specific equitable lien upon the insurance money, which is valid as against the creditors of the mortgagor. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and furnishes notice to third persons; and no subsequent assignment or other act can affect the rights of the mortagee. It is not necessary that the policies be assigned, nor that the mortgagee select the companies; and any act of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant.[1]

Special stipulations and conditions.— Many mortgagees insist upon a number of special stipulations and conditions in mortgages accepted by them. The stipulation for insurance for the mortgagee's benefit, being intended to afford security supplementary to and connected with the mortgage, is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and all others who may succeed to his rights with notice.[2] The stipulation that in case of a default in the payment of interest the principal shall immediatly become due and payable, and that the mortgagee may immediately proceed to foreclose, is an essential part of the contract and may be enforced;[3] and the same rule applies to the similar stipulation relative to the non-payment of taxes.[4]

Record of mortgages.— Mortgages come within the provisions of the recording acts, and impart notice in like man-

[1] In re Sands' Ale Brewing Co., 3 Biss. 175. In this matter, the question was raised by the assignee in bankruptcy of the mortgagor.

[2] Miller v. Aldrich, 31 Mich. 408. A failure in this respect constitutes such a default as will justify the mortgagee in selling under the power in the mortgage. Walker v. Cockey, 38 Md. 75.

[3] Gulden v. O'Byrne, 7 Phil. (Pa.) 93; Malcom v. Allen, 49 N. Y. 448 Meyer v. Graeber, 19 Kan. 165 Cook v. Clark, 68 N. Y. 178.

[4] Stanclifts v. Norton, 11 Kan. 218.

ner as deeds.[1] They are governed in this respect by the same general rules as affect other conveyances, while in several states they are further regulated in regard to priority, etc., by special laws. The registry of a mortgage is notice only to the extent of the sum specified in the record,[2] and of the property therein described,[3] and intending purchasers are only chargeable with notice of such facts as the record discloses, and not of undisclosed intent.[4]

If a mortgage is given to secure an ascertained debt, the amount of the debt should be stated; and if it is intended to secure a debt not ascertained, such data should be given respecting it as will put any one interested in the inquiry upon the track leading to a discovery. If it is given to secure an existing or a future liability, the foundation of such liability should be set forth. Without this, a subsequent *bona fide* purchaser, with no actual knowledge or notice of the facts, is not chargeable with notice of the amount secured.[5]

As between two mortgages, the first recorded is the prior lien;[6] and where a mortgage and conveyance of the same property are made at the same time, the mortgage, if recorded first, will take precedence of the deed.[7] The rights

[1] Johnson v. Stagg, 2 Johns. 510; Rice v. Dewey, 54 Barb. (N. Y.) 455; Hickman v. Perrin, 6 Coldw. (Tenn.) 135; Shannon v. Hall, 72 Ill. 354; Van Aken v. Gleason, 34 Mich. 477.

[2] Beekman v. Frost, 18 Johns. 544; North v. Belden, 13 Conn. 376. Even though there has been a mistake in recording. Bullock v. Battenhousen, 108 Ill. 28; Lowry v. Davis, 69 Ind. 589. But it would seem that the recorder would be liable in damages to any one who might suffer from the error. Lowry v. Davis, 69 Ind. 589.

[3] Simmons v. Fuller, 17 Minn. 485; Galway v. Malchou, 5 Neb. 285; White v. McGarry, 2 Flip. (C. Ct.) 572.

[4] Disque v. Wright, 49 Iowa, 538; Galway v. Malchou, 5 Neb. 285; Herman v. Deming, 44 Conn. 124.

[5] So held where the record merely stated that the grantor had on the same date as the mortgage made his promissory note, payable, etc., without giving the amount. Bullock v. Battenhousen, 108 Ill. 28; Hart v. Chalker, 14 Conn. 77. But see North v. Knowlton. 23 Fed. Rep. 163, where *en semble* a contrary doctrine is indicated.

[6] Ripley v. Harris, 3 Biss. 199; Odd Fellows Sav. Bank v. Banton, 46 Cal. 603; Van Aken v. Gleason, 34 Mich. 477.

[7] Ogden v. Walkers, 12 Kan. 282.

of the mortgagee are fixed when he places his mortgage on record, and the subsequent destruction of the record, will not, it seems, extinguish or destroy the notice afforded by such registration, nor injuriously affect his interest in the land;[1] while as between the original parties,[2] and their heirs,[3] the mortgage will still be valid and effective although unrecorded.

Power of sale.—The policy of recent years has been to restrain the execution of powers of sale and to compel the mortgagee to forclose his lien in chancery. Where this rule now prevails, the following paragraph will have no application.

The power of sale contained in a deed of trust or mortgage must be strictly pursued,[4] and the utmost fairness must be observed in its execution; but such strictness and literal compliance should not be exacted as would destroy the power.[5]

When permitted by statute, the sale of a mortgaged estate, being made in pursuance of a valid power given by the owner, vests in the purchaser an estate in fee, free from the original condition and from any right of redemption;[6] and the power, being coupled with an interest, is irrevocable, and hence may be exercised even after the death of the mortgagor.[7]

Though one who undertakes to execute a power is bound to a strict compliance therewith, as well as the observance of good faith,[8] and a suitable regard for his principal, yet a

[1] Shannon v. Hall, 72 Ill. 354.

[2] Cavanaugh v. Peterson, 47 Tex. 197.

[3] McLaughlin v. Ihmsen, 85 Pa. St. 364.

[4] Cranston v. Crane, 97 Mass. 459.

[5] Waller v. Arnold, 71 Ill. 350. Parties to a mortgage may, by stipulation, regulate the terms of a power of sale of the premises by the mortgagee; and the courts will not interfere to control the right, in the absence of fraud, or of some statutory regulations on the subject. Elliott v. Wood, 45 N. Y. 71.

[6] Kinsley v. Ames, 2 Met. 29.

[7] Berger v. Bennett, 1 Caines' Cas. (N. Y.) 1. Local statutes may, however, serve to modify the statement of the text.

[8] If a sale is made by a mortgagee under a power in a mortgage, not in good faith, but in fact for himself, to whom the purchaser conveys, the sale is not void, but only voidable in equity, and it

dereliction in this respect will not usually affect a purchaser in good faith, who being a stranger to the proceedings, and finding them all correct in form, takes the property;[1] yet as the payment of the debt secured by the trust deed or mortgage defeats the power of sale, a purchaser at a sale made under such power must see to it that the grantor in the deed or mortgage is in default, and that some part of the debt is due or unpaid.[2]

The omission of the power from a mortgage merely limits the mode of foreclosure to that by bill in equity,[3] while its insertion does not oust the jurisdiction of a court of equity, nor preclude a party from resorting to that tribunal. It is cumulative only.[4] In its general nature it is a power coupled with an interest, is irrevocable, appendant to the land, and passes by an assignment of the mortgage and secured debt;[5] it is not impaired by the death of the mortgagor, nor by lapse of time, if not unreasonable, in closing the sale made under it, and covers the equity of redemption, not only of a husband, but also that of his wife surviving him.[6]

Assignment of mortgage.—The interest of a mortgagee, whether regarded as a lien or an estate, is assignable in law by a proper instrument purporting to convey the same, while the assignment of the notes secured by the mortgage operates in equity as an assignment of the mortgage itself.[7] In the latter case the assignment of the debt carries with it the security for the debt, and ordinarily whoever owns the debt is likewise the owner of the mortgage.[8]

may be set aside while the title remains in the mortgagee, but not after transfer to a *bona fide* purchaser. Gibbons v. Hoag, 95 Ill. 45.

[1] Montague v. Dawes, 14 Allen, 369.

[2] Ventres v. Cobb, 105 Ill. 33.

[3] Cowles v. Marble, 37 Mich. 158.

[4] McAllister v. Plant, 54 Miss. 106.

[5] McGuire v. Van Pelt, 55 Ala. 344; Strother v. Law, 54 Ill. 413; Hyde v. Warren, 46 Miss. 13; Brown v. Delaney, 22 Minn. 349.

[6] Strother v. Law, 54 Ill. 413.

[7] Holmes v. McGinty, 44 Miss. 94; Moore v. Cornell, 68 Pa. St. 322; Blake v. Williams, 3 N. H. 39; Croft v. Bunster, 9 Wis. 503; Potter v. Stevens, 40 Mo. 229. An assignment in law is not recognized in some states.

[8] Kurtz v. Sponable, 6 Kan. 395; Nelson v. Ferris, 30 Mich. 497; Preston v. Morris Case & Co., 42 Iowa,

Assignments of mortgages, however, are usually made by an instrument in writing and under seal, which, when recorded, affords constructive notice of the rights of the assignee to all persons, as against any subsequent acts of the mortgagee affecting the mortgage, and protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee.[1] The law does not require the assignment to be recorded, as essential to its validity, nor is it necessary for the purposes of foreclosure; and assignments are excepted from the operation of the recording laws of many of the states.

With respect to the necessity of registration for priority of title, the same general rule prevails between different assignees of a mortgage as between grantees in ordinary deeds,[2] and a release by the mortgagee, no assignment appearing of record, will effectually divest the lien, notwithstanding an assignment has in fact been made.[3]

In a few states a mortgage is not assignable, either by the statute or by the common law; the assignment of the note

549; Mulford v. Peterson, 35 N. J. L. 129; Conner v. Banks, 18 Ala. 42; Bell v. Simpson, 75 Mo. 485. Where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose, and in such case no assignment of the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it. Walker v. King, 44 Vt. 601. And in like manner a party paying a decree of foreclosure becomes invested with the rights of the mortgagee and the assignee in equity of the mortgage; although in this case the mortgage is in fact paid, yet equity will require it to subsist until every party who owes a duty under the mortgage shall have discharged it. Wheeler v. Willard, 44 Vt. 640.

[1] Viele v. Judson, 82 N. Y. 32; Stein v. Sullivan, 31 N. J. Eq. 409; Torrey v. Deavitt, 12 Reporter, 508.

[2] Wiley v. Williamson, 68 Me. 71; Trust Co. v. Shaw, 5 Sawyer (C. Ct.) 336; McClure v. Burris, 16 Iowa, 591; Torrey v. Deavitt, 53 Vt. 331; Bacon v. Van Schoonhover, 87 N. Y. 446.

[3] Mitchell v. Burnham, 44 Me. 303; Bank v. Anderson, 14 Iowa, 544; Johnson v. Carpenter, 7 Minn. 176; Union College v. Wheeler, 61 N. Y. 88; Baldwin v. Sager, 70 Ill. 505; Ayers v. Hays, 60 Ind. 452; Swartz v. Leist, 13 Ohio St. 419.

carries the mortgage with it, but only in equity, and trust deeds given as security for a loan, being regarded in the nature of mortgages, stand upon the same footing as regards assignability.[1]

Operation and effect of assignments.—Though there are not wanting authoritative decisions to the contrary, yet the later and more generally received doctrine seems to be that an assignment is to be regarded only as the transfer of a mere chose in action, and not an interest in lands, the debt being considered as the principal and the land only the incident;[2] and that the assignee takes it charged with the notice which his assignor had of prior incumbrances, and subject not only to any latent equities that exist in favor of the mortgagor, but also subject to equities in favor of third persons.[3]

Formal requisites of assignments.—Though the earlier decisions hold that the interest of a mortgagee may be transferred or conveyed by the same form of deeds by which the owner of the legal estate can convey it,[4] the current of later cases pronounces a contrary doctrine. The mortgagee's interest, being a mere chattel interest, is inseparable from the debt it is given to secure;[5] and, not constituting an estate or interest in the land, will not pass by any conveyance of the same. Hence a deed of all the grantor's "estate, title and interest" in the mortgaged premises,[6] or a conveyance of all his "lands, tenements and hereditaments,"[7] will not operate as an assignment of a mortgage; and generally, any conveyance

[1] Olds v. Cummings, 31 Ill. 188; Walker v. Dement, 42 Ill. 272; Baily v. Smith, 14 Ohio St. 396.

[2] Delano v. Bennett, 90 Ill. 533; Hitchcock v. Merrick, 18 Wis. 357; Paige v. Chapman, 58 N. H. 333; Bennett v. Saloman, 6 Cal. 134.

[3] Sims v. Hammond, 33 Iowa, 368; Mason v. Ainsworth, 58 Ill. 163; Schofer v. Reilly, 50 N. Y. 61; Crane v. Turner, 67 N. Y. 437; Coffin v. Taylor, 16 Ill. 457; Olds v. Cummings, 31 Ill. 188.

[4] Welch v. Priest, 8 Allen (Mass.), 165; Cutler v. Daverport, 1 Pick. 81. And see Connor v. Whitmore, 62 Me. 186; Stewart v. Barrow, 7 Bush (Ky.), 368. But this is when the legal estate passes to the mortgagee.

[5] Mack v. Wetzler, 39 Cal. 247; Seckler v. Delfs, 25 Kan. 159; Trim v. Marsh, 54 N. Y. 599.

[6] Swan v. Yaple, 35 Iowa, 248; Runyan v. Messereau, 11 Johns. 534; Delano v. Bennet, 90 Ill. 533.

[7] Mack v. Wetzler, 39 Cal. 247.

or attempted conveyance of the mortgagee's interest before foreclosure, not accompanied by a transfer of the debt secured, is a nullity.[1]

The interest owned by the mortgagee has reference solely to the mortgage debt, and any instrument which describes the parties and the indebtedness, and sufficiently identifies the mortgage, will be effective as an assignment without reference to the mortgaged premises, while the instrument, in form, should purport to be a transfer of the mortgage itself and of the debt thereby secured, and not of the mortgaged lands.[2]

Release and satisfaction.— Where no satisfaction appears of record, the law will presume a payment of the debt which the mortgage was given to secure, where the mortgagee has failed to exercise his right of foreclosure for the period of twenty years,[3] and the mortgage will cease to be a lien after the expiration of that period.[4] The mortgage may also be satisfied by foreclosure, but the term "satisfaction," as ordinarily used, refers to a specific acknowledg-

[1] Delano v. Bennett, 90 Ill. 533; Swan v. Yaple, 35 Iowa, 248; Johnson v. Cornett, 29 Ind. 59; Ellison v. Daniels, 11 N. H. 274. But if the mortgagee is in possession under his mortgage, his conveyance, while it would be ineffectual as regards the title, might yet be sufficient to confer on his grantee a right of possession. Welsh v. Phillips, 54 Ala. 309.

[2] When the mortgage is regarded as a mere incident to the debt this would be sufficient, but more would be required in states where the mortgagee holds the legal title and estate. In such states an assignment of the mortgage, in terms which do not profess to act upon the land, would not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. Williams v. Teachey, 85 N. C. 402.

[3] Goodwin v. Baldwin, 59 Ala. 127; Lawrence v. Ball, 14 N. Y. 477; Emory v. Keighan, 88 Ill. 482; Howland v. Shurtleff, 2 Met. (Mass.) 26. The presumption is disputable, however. Cheever v. Perley, 11 Allen (Mass.), 588.

[4] This follows as a result of the statute of limitations. See, also, Blackwell v. Barnett, 52 Tex. 326; Whitney v. French, 25 Vt. 663; Pollock v. Maison, 41 Ill. 516; Locke v. Caldwell, 91 Ill. 417. And consult 4 Kent's Com. 189; Jackson v. Wood, 12 Johns, 242. In some states a much shorter period has been fixed by statute

ment of payment and discharge of the lien as evidenced by some written instrument.

Though the terms "release" and "satisfaction" are used interchangeably, there is yet an important distinction between them. A satisfaction implies a payment of the debt, and *ipso facto* an extinguishment of the lien, whereas a release or discharge may relieve the land from the burden of the lien without in the least impairing the legal efficacy of the debt.[1]

Form and requisites of release.—The general requisites of a release of mortgage differ somewhat, according to the light in which it is to be regarded. Where the mortgage retains its common-law character of a conveyance of the legal estate, a deed under seal with apt words of conveyance would be necessary to revest the title of the mortgagor, which might be effected by a deed of release and quitclaim;[2] but where it is regarded only in the character of a lien or security, any instrument showing an intention to relieve the land from the burden, or acknowledging payment or satisfaction of the debt secured by the mortgage, will be sufficient to divest the lien and restore the land to its original condition.[3] The latter instrument is that now generally used, and, as a rule, it is required by statute to be executed by the mortgagee or his assignee, and acknowledged or proved in the manner provided by law to entitle conveyances to record, and must specify that such mortgage has been paid, or otherwise satisfied or discharged. No other formalities seem necessary, and such certificate, popularly known as a "satisfaction piece," has the same effect as the old deed of release.[4] In a few states a modified form of a release deed is

[1] Adginton v. Hefner, 81 Ill. 341.

[2] Waters v. Jones, 20 Iowa, 363; Allard v. Lane, 18 Me. 9; Perkins v. Pitts, 11 Mass. 125. And see 2 Jones on Mortgages (2d ed.), § 972 *et seq.*

[3] Headley v. Gaundry, 41 Barb. 279; Thornton v. Irwin, 43 Mo. 153; Lucus v. Harris, 20 Ill. 165.

[4] A satisfaction piece is a conveyance within the meaning of the recording acts, and one who buys or advances money to be secured by mortgage on the premises is a *bona fide* purchaser within the provisions of said acts. Bacon v. Van Schoonhoven, 87 N. Y. 446. It takes the place of a release. *Ibid.* And see Merchant v. Woods, 27 Minn. 396.

still preserved, though its operation and effect is almost identical with the certificate of payment or "satisfaction piece" of the other states. It is customary, but not essential, to describe the property, and, except in case of partial releases, such description has no other effect than to give greater certainty to the instrument in the identification of the land.

Release by trustee.—Where by a trust deed, duly recorded, land is conveyed to trustees in fee, and they are authorized to release same to the grantor upon payment of the indebtedness thereby secured, a release before payment would be a breach of their trust and would be unavailing in equity to any one who had knowledge of the breach.[1] But, being vested with the legal title, the same would pass by their deed of release to the releasee,[2] and a second conveyance by him to one having no knowledge of such breach, the records, or any conveyancer's abstract thereof, showing the land to be unincumbered, would vest the legal title in the grantee, or, if made by way of pledge, would entitle the indebtedness thereby secured to priority of payment.[3]

A far greater degree of care must be observed, however, with respect to the releases of a trustee than of a mortgagee, and purchasers are chargeable with notice of all the recitals of a trust deed. They are bound to observe the limited power of the trustee to release the pledged property, the time the notes for which it was given have to run, and the terms which authorize a reconveyance; and where a release is made before the maturity of the notes, they being negotiable, a purchaser should insist upon their production or of satisfactory evidence showing that they have been surrendered or paid.

Marginal discharge.—A release or discharge made by entry upon the margin of the record of the mortgage or

[1] Insurance Co. v. Eldredge, 102 U. S. 545.

[2] Taylor v. King, 6 Munf. (Va.) 358; Den v. Trautman. 7 Ired. (N. C.) 155.

[3] Williams v. Jackson, 15 Reporter, 705; Barbour v. Scottish-American Mfg. Co., 102 Ill. 121.

other instrument is in common use in all the states, and when made by the owner of the mortgage, with whatever formalities may be prescribed by law, is as effectual in divesting the lien of record as a formal and separate satisfaction piece or release.[1] It will be understood, however, that the authority of the person so undertaking to make the discharge must affirmatively appear of record, for a marginal entry of satisfaction by a stranger, without authority, is void, although he claims to be the assignee of the mortgage and owner of the indebtedness;[2] and where a person purporting to be the "assignee of said mortgage" assumes to discharge same, but no assignment appears of record, this constitutes a radical defect in the title.[3]

When a mortgage or deed of trust is duly recorded, the person whose property is incumbered thereby is entitled, upon fully paying and satisfying the debt to secure which such mortgage or trust deed was given, to have satisfaction of the same entered upon the margin of the record. And a mortgagee or trustee who fails or refuses, when duly requested, to enter up such satisfaction or to execute a deed of release, is liable in damages to the party aggrieved.[4]

Foreclosure.—The extinction of the right to redeem is termed *foreclosure.* This may be accomplished in a variety of ways. The first and most widely employed method is by a bill in equity praying for a payment of the mortgage debt or that in default the mortgaged lands be sold and the debt satisfied from the proceeds of sale. This conforms very closely to the ancient remedy. A second method is by a sale under a power contained in the mortgage. This is con-

[1] A purchaser finding a mortgage satisfied of record by a marginal entry, and upon the faith of which, without actual notice of a mistake, pays the purchase price, will take the title clear of the mortgage, although it turns out that the entry was a mistake which would be rectified as between the parties. Ayers v. Hays, 60 Ind. 452.

[2] De Laureal v. Kempar, 9 Mo. App. 77.

[3] Torrey v. Deavitt, 53 Vt. 331.

[4] Verges v. Giboney, 47 Mo. 171; Sherwood v. Wilson, 2 Sweeney (N. Y.), 648. This is the general statutory doctrine.

ducted by the mortgagee or trustee in person and without the aid of any judicial determination or proceeding. About the only formality required is a notice of sale published some time anterior thereto. A third method is by an entry upon the land, either by virtue of a decree of court or by force of the terms of the mortgage. All of these methods are subject, more or less, to statutory direction.

Foreclosures by entry and possession, or *strict foreclosures*, are now rarely pursued or allowed in a majority of the states, while in many they are positively prohibited. They are regarded by courts as severe remedies, inasmuch as they transfer the absolute title without sale, and sometimes without notice, no matter what the value of the premises. In like manner foreclosures by advertisement and sale, so called, or foreclosures under a power, are now generally discountenanced even where allowed, and resort is usually had to a court of equity to state an account and adjust the rights of the parties. The tendency now is to subject all foreclosure sales to the scrutiny and supervision of a competent tribunal.

(f) *Conveyances of Chattels Real.*

Generally considered.—When in the progress of civilization in England the great lords finally emancipated their villeins they still continued to employ them in the cultivation of their estates, the possession and profits of which they granted to them either from year to year or for a certain number of years, reserving to themselves for such use an annual return from the tenant of corn or other provisions. Hence the lands thus granted were called *farms*, from the Saxon word *feorm*, which signifies provision. The compensation or return for the use of the land thus let, acquired the name of *rent*.[1] At common law rent is a species of incorporeal property, and under the English land system it has assumed a large number of forms to meet the varying exigencies of the times and conditions of the people.[2]

[1] Cruise, Dig., tit. 28, ch. 1.

[2] See 2 Black. Com. 41; Cruise, Dig., tit. 28; 3 Kent, Com. 460.

Rent might be reserved, at common law, upon every form of conveyance which either passed or enlarged an estate, but was usually reserved on what was termed a *lease.*

At present it may be stated generally that a lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or it is a conveyance to a person for life or years, or at will, in consideration of such rent.[1] The grantor of a lease is called the *landlord* or *lessor;* the grantee is known as the *tenant* or *lessee,*[2] while the interest granted is technically denominated the *term.*[3] The word "term" in this connection denotes not only the duration of the interest of the lessee, but also the interest itself. It will therefore be seen that the term may expire during the continuance of the time, as by surrender, forfeiture or merger.

The estate or interest conveyed by a lease for years is personal in its nature, whatever may be the duration of the term, and, falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed by the rules which regulate this class of property.[4] When made in writing, as it is generally required to be if the term exceeds one year in duration, a lease is usually mutually signed in duplicate and interchangeably delivered by the parties. The copy delivered to the tenant is called the *original* lease, the one to the landlord the *counter-part;* but for all practical purposes both are regarded as original.[5] While the better practice is to have both parties execute the lease, yet if only signed by the lessor, its acceptance by the lessee raises a promise on his part to pay the rent reserved and

[1] Jackson v. Harsen, 7 Cow. 326; 2 Bl. Com. 217.

[2] In England the lessee is sometimes called the *termor,* and frequently, from the main object of the transaction, the *farmer.* Digby Hist. Real Prop. 240.

[3] From *terminus,* signifying that it is bounded and precisely determined, having a certain beginning and certain end. 2 Flint, Real Prop. 203.

[4] 2 Kent, Com. 342; Goodwin v. Goodwin, 33 Conn. 314.

[5] Dudley v. Sumner, 5 Mass. 438; Taylor's Landlord and Tenant, 106 (6th ed.).

faithfully observe all the stipulations and conditions which the lease shows are to be observed or performed by him.[1]

Whether an instrument shall be considered a lease, or only an agreement for one, depends on the intention of the parties, as collected from the whole instrument; and the law will rather do violence to the words than break through the intent of the parties by construing such an instrument as a lease, when the intent is manifestly otherwise.[2]

The proper definition of a lease embraces only such instruments of conveyance as transfer to the lessee a *less estate* than is possessed by the lessor, thus leaving a reversion in him,[3] and this is the sense in which the term is now employed; yet formerly it was not uncommon to grant land in fee, reserving an annual rent charge, notwithstanding there was no reversion in the grantor; and the covenant to pay such rent ran with the land, as well as the condition of reentry for its non-payment.[4]

Creation of a term.—Notwithstanding the fact that it is customary to insert in conveyances by way of lease a large number of covenants, stipulations and agreements, creating contractual relations ofttimes of a complicated nature, yet the essence of an instrument of this kind is extremely simple. A term of years may be created by any form of expression showing an intention on the part of the lessor to transfer possession, and a reciprocal intention on the part of the lessee to assume same. The usual words of grant are "demise, lease, and let," or, "to farm let," and these words have been held to import the creation of a term to begin presently, and not at a future day or upon a contingency;[5] but their use is not indispensable to constitute a valid lease.[6] Any words indicative of present grant are sufficient, but

[1] Pike v. Brown. 7 Cush. 134.

[2] Jackson v. Delacroix, 2 Wend. 433.

[3] Williard's Conveyancing, 425.

[4] Van Rensselaer v. Hays, 5 Smith, 68; 2 Sugd. Vend. 725, Perkins' ed., 177; Jackson v. Allen, 3 Cow. 220.

[5] See Cong. Meeting House v. Hilton, 11 Gray (Mass.), 409.

[6] Moshier v. Reding, 12 Me. 135; Moore v. Miller, 8 Pa. St. 272; Jackson v. Dalacroix, 2 Wend. (N. Y.) 438.

unless this intention does appear the instrument will be regarded merely as an agreement for a lease.[1]

The proper words to be used in creating a limitation upon a term demised are, "while," "as long as," "for, during and until;" but, like other technical words, they have now but little special efficacy, and any other words which show intention will do as well.[2] The earlier method of limitation seems to have been to describe the term by years; thus, the *habendum* would be to hold "from the day of the date hereof, for, during and until, the full end and term of twenty years," etc., and where the lease is for an extended term this formula is still employed. But for shorter periods, say for one or two years, the usual method now is to limit the term by fixed dates of commencement and termination; as, to hold, "from the first day of May, 1899, until the thirtieth day of April, 1900."

It is usual to add after the lessee's name the words "executors and administrators" in analogy to "heirs" as used in the grant of a fee, but while this addition is recommended as conforming to the rules of neat conveyancing it is not necessary. An unexpired term will pass to the executor of a deceased tenant by operation of law as in the case of any other chattel.

Property subject to lease.—As a general rule the possession and profits of any species of real property may be the subject of lease, and when the statute interposes no prohibition such lease may be for any length of time. To avoid perpetuities, as well as the creation of large manorial estates, a majority of the states have, either by a constitutional provision or an express statutory enactment, prohibited the lease or grant of agricultural land for a longer period than twelve or fifteen years, and leases made in contravention of this prohibition, in which there is reserved any rent or service of any kind, are declared to be void. The leases or grants contemplated by these laws are such as are held by the tenant upon

[1] Scully v. Murray, 34 Mo. 420; Haughery v. Lee, 17 La. Ann. 22.

[2] Vannatta v. Brewer, 32 N. J. Eq. 268; Hallett v. Wylie, 3 Johns. (N. Y.) 44. And see Taylor, Land. and Ten. 114.

a reservation of an annual or periodical rent or service, to be paid as a compensation for the use of the estate granted. It is still competent to make a grant for life, or lives, upon a good consideration to be paid for the estate, which consideration may be payable at once, or by instalments, or in services, so that it be not by way of rent. To bring it within the law the parties must sustain the technical relation of landlord and tenant and there must be a reservation of rent or service.[1] A *reservation*, as used in this connection, is defined as a keeping aside, or providing, as when a man lets, or parts with his land, but reserves, or provides himself a rent out of it for his livlihood; and a rent is said to be a sum of money, or other consideration, issuing yearly out of lands and tenements. It must be profit, but it is not necessary that it should be money. The profit must be certain, and it must also issue yearly,[2] although it is not essential that it be paid yearly.

Covenants and conditions.—Owing to the ignorance generally prevailing of the legal effects of covenants in leases and other instruments which are often executed without any particular inspection or knowledge of their contents, people are often surprised into contracts which neither party intended when the instrument was executed.[3] The words "yielding and paying," etc., constitute a covenant for the payment of rent,[4] which runs with the land, and, if not qualified by any exception or condition, will bind the tenant to pay rent during the continuance of the term, notwithstanding the buildings on the premises may be destroyed by fire during the tenancy.[5] This harsh rule has been quite generally modified by statute, however, and in practice it is customary to insert a clause providing for a determination of the lease in case of the accidental destruction of buildings.

The usual covenants on the part of the lessee are, (1)

[1] Parsell v. Stryker, 41 N. Y. 480.

[2] Stephens v. Reynolds, 6 N. Y. 458. And see 2 Black. Com. 41.

[3] Phillips v. Stevens, 16 Mass. 239.

[4] De Lancy v. Ganong, 5 Seld. 9.

[5] Hallett v. Wylie, 3 Johns. 44; Phillips v. Stevens, 16 Mass. 238.

to pay rent, (2) to pay taxes, though frequently these are payable by the lessor, (3) to keep the buildings in good repair, (4) to allow the lessor to enter and view the property, (5) not to assign or under-let without consent, and (6) to deliver up possession on the termination of the lease. To these local customs will add many more.

Covenants for rebuilding, repairing, etc., run with the land and are obligatory upon both parties and their assigns,[1] according as either of the parties are bound. The covenant to pay for any buildings erected by the tenant, at the expiration of the term, runs with the land and inures to the benefit of his assignee.[2]

The covenant of renewal is one of the most important, and like those just mentioned is incident to the land.[3] A covenant to renew implies the same term and rent, but not the same covenants,[4] and is satisfied, even though it be to renew under the same covenants contained in the original lease, by a renewal omitting the covenant to renew.[5] The burden of the payment of taxes and assessments is frequently assumed by the tenant, particularly in long terms, but whether assumed by lessor or lessee it runs with the land, and binds the respective assigns.[6]

The covenants of leases are usually protected by conditions avoiding the estate and working a forfeiture in case of breach, and such conditions are of the essence of the lease.

Implied covenants.—It is a fundamental rule that the law will always imply covenants against paramount title,

[1] Allen v. Culver, 3 Denio, 284.

[2] Lametti v. Anderson, 6 Cow. 302; Van Ransselær v. Pennimar, 6 Wend. 569.

[3] Sutherland v. Goodnow, 108 Ill. 528.

[4] Rutgers v. Hunter, 6 Johns. Ch. 218. The covenant for renewal may be specially enforced, provided the application be made within a reasonable time after the expiration of the former lease, and the owner of the reversion or fee will be compelled to execute a new lease. Banks v. Haskie, 45 Md. 209.

[5] Carr v. Ellison, 20 Wend. 178. A covenant to renew which does not state the terms or length of time of such renewal has been held void for uncertainty. Laird v. Boyle, 2 Wis. 431.

[6] Post v. Kearney, 2 Comst. 394; Oswald v. Gilfert, 11 Johns. 443.

and against such acts of the landlord as tend to destroy the beneficial enjoyment of the premises.[1] This results from the principle of law that every grant carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial, and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.[2] To attain this, however, there must, as a rule, be some express words of grant, but "lease" or "demise" will be sufficient.

There are no implied covenants, however, respecting the condition of the premises, or that they are suitable for the purposes for which they were leased, or that the buildings will be kept in repair. On the contrary the tenant takes them as they are, and a landlord, in the absence of express covenants on his part, is not required to repair, even when the buildings become defective from decay.[3] So too, if there are no express covenants respecting same, the law will always imply covenants on the part of the lessee that he will use the property in a prudent and careful manner and will cultivate the land, in case of agricultural leases, in accordance with the rules of good husbandry or the established customs of the neighborhood.

Assignment of lease — Sub-tenancy. — If there are no covenants or agreements to the contrary a leasehold may be *assigned* or the premises may be *sub let.* To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired term, but he must take the whole estate, or, in other words, the whole term;[4] for the word "term" does not merely signify the

[1] Wade v. Halligan, 16 Ill. 507; Plater v. Cunningham, 21 Cal. 233; Maule v. Ashmead, 20 Pa. St. 482; Hamilton v. Wright, 28 Mo. 199.

[2] See Dexter v. Manley, 4 Cush. (Mass.) 24.

[3] Scott v. Simons, 54 N. H. 426; Biddle v. Reed, 33 Ind. 529; Peterson v. Smart, 70 Mo. 34.

[4] Van Ransselaer v. Gallup, 5 Denio, 454. The purchaser under a mortgage of all the estate of a lessee is an assignee. Kearney v. Post, 1 Sandf. 105.

time specified in the lease, but the estate and interest that passes by the lease as well; the term may expire during the continuance of the time, as by surrender, forfeiture, and the like.[1] The grant of an interest therefore, which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term.

If, by the terms of the new conveyance, it be in the form of a lease or an assignment, and new conditions with a right of entry or new causes of forfeiture are created, then the tenant holds by a different tenure and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term. This would constitute an *under letting.* When an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest;[2] and where by the terms of an instrument which purports to be an under-lease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition which restores the sub-lessor to his former interest in the premises, the sub-lessee takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term; that is to say, an interest which may be terminated by forfeiture, on new and independent grounds, long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sub-lessee, and not as assignee.[3]

3. *Fiduciary or Official Conveyances.*

Defined and distinguished.—Official deeds comprise all those conveyances wherein the grantor acts by virtue of an office or commission and not in his individual or personal capacity. They cover a wide portion of the field of conveyancing and assume a variety of shapes, but may be reduced to two general classes, viz.:

[1] 2 Black. Com. 144.

[2] Austin v. Cambridgeport Parish, 21 Pick. 215; Brattle Square Church v. Grant, 3 Gray, 147.

[3] Dunlap v. Bullard, 11 Reporter, 774; McNeil v. Kendall, 128 Mass. 245.

(*a*) Those made by *trustees*, and

(*b*) Those made by *executive* and *ministerial officers*.

The former class embraces all forms and modes of conveyance by persons acting in a purely fiduciary capacity, and whose authority is derived through some direct delegation of power emanating from the person last seized. This power is reposed in the donee as a confidence, and is illustrated in the case of trustees, executors, etc. The latter class, while in every proper sense of the word fiduciary conveyances, are made by persons who act in a ministerial capacity as the executive officers of courts, as in the case of sheriffs, masters, administrators, etc. The rules for construing deeds are much the same, whether the deed be made by a party in his own right, or by a fiduciary or officer of the court.[1]

It is the policy of the law to invest the sheriff, master in chancery, administrator, etc., in making sales of real estate, with only a mere naked power to sell such title as the debtor, deceased person, etc., had, without warranty, or any terms except those imposed by law. Hence a purchaser at such sales takes the risk of the title and the validity of the proceedings under which the sale is made.[2] The power to sell lands, however conferred, must as a rule, be strictly pursued, otherwise the sale will be void and no title will pass;[3] and a deed which shows on its face an excess of authority in the officer executing it will not be sufficient to sustain the title of one claiming under it.[4]

There are no implied covenants in official deeds,[5] and where the deed contains express covenants they have been held to bind the officer personally.[6]

[1] White v. Luning, 93 U. S. 515.

[2] Bishop v. O'Connor, 69 Ill. 431.

[3] King v. Whiton, 15 Wis. 684; White v. Moses, 21 Cal. 44.

[4] G. B. & M. C. Co. v. Groat, 24 Wis. 210; French v. Edwards, 13 Wall. 506. The deed in this case was by a sheriff under a judgment for taxes. The deed recited the sale of the property to the highest bidder, when he was authorized by the statute only to sell the smallest quantity of the property which any one would take and pay the judgment and costs, and was held void on its face.

[5] Webster v. Conley, 49 Ill. 13.

[6] Prouty v. Mather, 49 Vt. 415; Summer v. Williams, 8 Mass. 162; Mitchell v. Haven, 4 Conn. 485:

The recitals in official deeds are usually regarded only as matters of inducement,[1] and are not of their essence unless prescribed by statute, in which event they become substance.[2] They are usually taken as evidence against the grantee and those claiming under him,[3] and as to such parties are conclusive.[4] They are further regarded as presumptive evidence of the facts stated and will prevail until the contrary is shown.[5]

(a) *Conveyances by Trustees.*

Trustees' deeds generally.—The nature and operation of trusts, as well as the duties and obligations of trustees, have been referred to in other portions of this work, and there remains now but to glance at the methods of the execution of trusts by trustees and the disposal of the trust estate.

In the management and disposition of trust property the conduct of trustees must be regulated and controlled by the provisions of the deed of trust or other instrument under which they hold. This makes the law by which they are governed; and trustees accepting the trust upon the terms and conditions of the instrument creating the same have no power to alter, change or dispense with those terms or conditions. If the instrument minutely and particularly prescribes the circumstances under which and the manner in which the trustees shall have authority to sell or otherwise dispose of the trust estate, they have no power or authority to dispose of it under any other circumstances or in any other manner.[6] So, too, those who deal with them on the faith of the trust estate must be aware that they exercise

Aven v. Beckom, 11 Ga. 1; Craddock v. Stewart's Adm'r, 6 Ala. 77; Magee v. Mellon, 23 Miss. 586.

[1] Leland v. Wilson, 34 Tex. 79; Foulk v. Coburn, 48 Mo. 225; Warner v. Sharp, 53 Mo. 598; Jones v. Scott, 71 N. C. 192. A clerical error in the recitals is not to be regarded in equity. Stow v. Steele, 45 Ill. 328.

[2] Atkins v. Kinman, 20 Wend. 249.

[3] French v. Edwards, 13 Wall. 506; Fisk v. Frores, 43 Tex. 340; Lamar v. Turner, 48 Ga. 329.

[4] Durette v. Briggs, 47 Mo. 356; Pringle v. Dunn, 37 Wis. 449; Robertson v. Guerin, 50 Tex. 317.

[5] Chase v. Whiting, 30 Wis. 544.

[6] Huntt v. Townshend, 31 Md. 336; Tyson v. Latrobe, 42 Md. 337.

only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that they confine themselves within their scope.[1]

A trustee having once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his co-trustees. All the trustees, in case of several, must unite in a disposal of the trust property, and a deed by two, while a third is living, is not valid.[2] The trustees take as joint tenants and all must unite in the execution of the trust, and especially in a deed of lands. So too, if by the terms of the trust the assent of the *cestui que trust* is necessary to the sale this assent should be manifested by his joining in the conveyance.[3]

Where a trustee's deed, made upon a sale under a valid deed of trust, shows the sale to have been made in strict conformity with the power contained in the trust deed, and the purchaser has had no notice of any irregularities in the sale, his title will be protected, as respects any such irregularities, if any there were, as that of an innocent purchaser.[4] On the other hand, unless the sale was authorized by the instrument creating the trust, the purchaser, if he acquires any title, merely succeeds to the trust as it was held by his grantee and is chargeable with its execution in the same manner.[5] It is not essential, however, that a power of sale be conferred in express terms in order to justify a sale of the trust estate, and the law will imply such power when the purposes of the trust cannot be accomplished without a sale;[6] as where lands are conveyed in trust to pay the grantor's debts.

[1] Owen v. Reed, 27 Ark. 122; Vernon v. Board of Police, 47 Miss. 181; Ventres v. Cobb, 105 Ill. 33.

[2] Ham v. Ham, 58 N. H. 70; Nalor v. Goodall, 47 N. J. ch. 53.

[3] Welton v. Palmer, 39 Cal. 456.

[4] Hosmer v. Campbell, 98 Ill. 572; Montague v. Dawes, 14 Allen (Mass.) 369.

[5] Jones v. Shaddock, 41 Ala. 262; Ryan v. Doyle, 31 Iowa 53. By statute in some states any conveyance in contravention of the trust is void. See Briggs v. Davis, 20 N. Y. 15.

[6] Vallette v. Bennett, 69 Ill. 632; Winston v. Jones, 6 Ala. 550.

When purchaser must see to application of purchase-money.—It is a common practice to insert in wills, and in deeds as well, where property is given to a trustee for sale and conversion, a proviso exonerating and absolving the purchaser at such sale from any duty or obligation to see that the purchase-money is applied to the purposes of the trust. This is largely an archaic survival. The doctrine of the obligation of purchasers to observe the proper application of the purchase-money in cases of sales by heirs, devisees, trustees and other fiduciaries once prevailed to a very great extent and abounded in much subtlety and finely graded distinctions, but these, in a large measure, have been swept away by special statutes in England, while in the United States the old English doctrine has rarely been administered except in cases of fraud in which the purchaser was a participant.[1] The general rule now is, and for years past has been, that a purchaser who in good faith pays the purchase-money to a person authorized to sell is not bound to look to its application; and there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose.[2]

The present rule of law in regard to trust estates is that when the trustee holds the trust estate for the purpose of sale and conversion into money, or with a power of sale and conversion, any one who in good faith accepts such transfer upon adequate compensation will acquire a valid title. But if the trustee has no power of sale the purchaser will acquire no title unless he shows that the purchase-money has been applied to the purposes of the trust. It is this which marks the true distinction between the cases where the purchaser is bound to see to the application of the purchase-money and where he is not.[3]

[1] See Potter v. Gardner, 12 Wheat. (U. S.) 498.

[2] Cryder's Appeal, 11 Pa. St. 72; Champlin v. Haight, 10 Paige (N. Y.) 275; White v. Carpenter, 2 Paige (N. Y.) 217; Gardner v. Gardner, 3 Mason (C. Ct.) 178. And see Warvelle on Vendors, 577.

[3] Redf. on Wills (3d ed.) 620.

With what notice purchaser is charged.— The law imposes upon every purchaser the duty of investigating the title of the property he acquires and charges him with notice of every defect which such inquiry would disclose. This is a fundamental principle applicable to all sales. Where the sale is made by a trustee the doctrine acquires additional force and when the instrument creating the trust shows the purpose of same, or the terms and conditions upon which the trustee is authorized to sell, the purchaser must take notice of every fact the due observance of which is essential to a valid execution of the power.[1]

In illustration of the foregoing take the case of an express authorization to sell on the happening of a certain contingency. In such a case, in the absence of the contingency there is no power to sell, and in case a sale should be made the title would fail if it were shown that the contingency had not occurred.[2] Therefore, as the authority to sell is derived from a power, it follows that a purchaser is bound to notice and to understand the extent of such power,[3] and he must see to it that the power has been executed in accordance with its essential conditions, or in default must assume the risk of the invalidity of his conveyance.[4]

Mortgagees' deeds.— Mortgagees' deeds, made in pursuance of a power of sale, differ in no important particular from conveyances by trustees, the mortgagee being, for the purposes of the conveyance, an executor of an express trust. He is held to the same strict rules that regulate the conduct of other trustees, and cannot exceed the express powers under which he acts. A mortgagee may sell the equity of redemption of the mortgagor and such interest as is conveyed to him by the mortgage under which he sells, but he cannot sell the equity of redemption by itself; nor can he sell an undivided portion of his interest in the land included in the mort-

[1] Hill v. Den, 54 Cal. 21; Styer v. Freas, 15 Pa. St. 339; Gunnell v. Cockerill, 79 Ill. 79.

[2] Huse v. Den, 85 Cal. 399; Gunnell v. Cockerill, 79 Ill. 79.

[3] Sears v. Livermore, 17 Iowa, 297.

[4] Powers v. Kuechoff, 41 Mo. 425; Reeside v. Peter, 33 Md. 129; Cassell v. Ross, 33 Ill. 244.

gage. A proper execution of the power of sale requires him to sell all he is entitled to under it,[1] and for the same reason he has no right to sell a greater interest than the mortgage gives him or authorizes him to sell. A violation of these rules will render the sale invalid.[2]

The recitals of a mortgagee's deed are material to its validity, as tending to show a due execution of the power and compliance with the conditions of the trust.[3]

The original purchaser at a sale by a mortgagee, under a power of sale contained in the mortgage, is chargeable with notice of defects and irregularities attending the sale, and cannot evade the effect;[4] but it would seem that as to remote purchasers, the sale is only voidable on proof of actual knowledge of such defects acquired before the consideration has been paid.[5] It has been held, however, that a properly executed deed reciting strict conformity, the purchaser having no actual knowledge or notice of any irregularity and taking such deed upon the strength of the assurances therein contained, will protect the title of such purchaser.[6]

Executor's deeds.—A testamentary executor stands in the place of and represents his testator.[7] He derives his power primarily from the will, and in this respect differs

[1] Fowle v. Merrill, 10 Allen, 350; Torrey v. Cook, 116 Mass. 163.

[2] Donohue v. Chase, 130 Mass., 137.

[3] Gibbons v. Hoag, 95 Ill. 45. Where a deed for land sold under a power in a mortgage, reciting correctly all the facts showing a right to make the sale, is recorded in apt time, the record thereof will affect all persons thereafter claiming under the mortgagee with constructive notice that there had been a valid sale under the power, although the deed may be defectively executed so as not to pass the legal title; Ibid.

[4] Hamilton v. Lubukee, 51 Ill. 415. But see Hosmer v. Campbell, 98 Ill. 572.

[5] Grover v. Hale, 107 Ill. 638.

[6] Hosmer v. Campbell, 98 Ill. 572.

[7] In the civil law the person who succeeded to the rights and occupied the place of a deceased person, being appointed thereto by the will of such deceased person, was called *hæres* and from this circumstance some writers have sought to deduce the principle of heirship in the common law. There is, however, not the slightest resemblance between the Roman *hæres* and the English *heir*. The former corresponds in

somewhat from an administrator, whose sole power is derived from the law and the directions of the court.[1] When acting under a naked testamentary appointment his powers are co-extensive with those of an administrator, and he is bound by the same rules and subject to the same restrictions. But the executor may also be a trustee,[2] and, when acting as such, the scope of his powers is measured and limited by the will which appoints him. The distinction, therefore, must ever be kept in view of the powers and duties of an executor, as such, and those which may devolve upon him as trustee, and not as executor.[3] Under his testamentary authority he may sell land, and otherwise execute the trusts, and exercise the powers enumerated and conferred in the will, subject to the general regulations of the statute, and free from the control or intervention of a court;[4] but where authority is not expressly given, or where, during the administration, he performs the ordinary offices of an executor, as where land is sold to pay the debts of decedent, no express power being given, he must first obtain authority or license from the probate court, and his sale must be reported to, and confirmed by, such court before a deed can lawfully issue to the purchaser. An executor's deed, therefore, will be governed by the law relating to trustees or administrators, according as he may convey in one or the other capacity, and the reader is referred to the remarks on those classes of deeds respectively.

Administrator with will annexed.— An administrator *with will annexed* occupies much the same position as an

character and duties almost with the executor of the common law. See Mackeldey's Civil Law, § 632 *et seq.*

[1] Walker v. Craig, 18 Ill. 16; Van Wickle v. Calvin, 23 La. Ann. 205; Gilkey v. Hamilton, 22 Mich. 283.

[2] Pitts v. Singleton, 44 Ala. 363.

[3] Warfield v. Brand, 13 Bush (Ky.) 77; White v. Clover, 59 Ill. 462.

[4] Buckingham v. Wesson, 54 Miss. 526; Whitman v. Fisher, 74 Ill. 147; Cronise v. Hardt, 47 Md. 433; Jelks v. Barrett, 52 Miss. 315; Hughes v. Washington, 72 Ill. 84. But the power must be explicit; general words do not confer power to sell lands. Skinner v. Wood, 76 N. C. 109.

executor, and may exercise many of the executor's powers.[1] He acts under the will, and, as a rule, any power given to the executor which is not in the nature of a personal trust—that is, where the power given belongs to the office of executor and not to the person—may be exercised by an administrator with the will annexed.[2] Where the will constitutes a personal trust which the executor alone could execute without the intervention of a court or some statutory regulation, the trust will not pass to the administrator with the will annexed, and sales of real property of the testator by the administrator will be without authority and void.[3] Where the will gives to an executor therein named powers and duties to be performed which do not ordinarily come within the scope of an executor's functions,[4] or where land is devised to him to be sold,[5] an administrator with the will annexed has no power, without the aid of a court, to sell the lands so devised or directed to be sold, or to execute the powers given to the executor.[6]

Trustees cannot become purchasers.—It is a settled principle of equity that no person who is placed in a situation of trust or confidence to the subject of the sale can be a purchaser of the property on his own account. The principle is not confined to a particular class of persons, such as guardians, trustees, etc., but is a rule of universal application to all persons coming within its principle, which is, that

[1] An administrator *cum testamento annexo* is appointed on the following occasions: 1. Where no executor is appointed by the will. 2. Where an executor is appointed but dies before the testator. 3. Where from any cause the executor becomes incompetent, disqualified or renounces the office. 4. Where the executor dies before the completion of administration; in this latter case the administrator is also administrator *de bonis non*.

[2] Anderson v. McGowan, 45 Ala. 462; Prescott v. Morse, 64 Me. 422; Belcher v. Branch, 11 R. I. 226.

[3] Anderson v. McGowan, 45 Ala. 280; Dunning v. Ocean Nat. Baak, 61 N. Y. 497: Ross v. Barclay, 18 Pa. St. 179.

[4] Ingle v. Jones, 9 Wall. 486.

[5] Nicoll v. Scott, 99 Ill. 529; Dunning v. Ocean Nat. Bank, 61 N. Y. 497; Gilchrist v. Rea, 9 Paige, 66.

[6] Such trusts frequently devolve upon a trustee whom the court may appoint for that purpose. Farwell v. Jacobs, 4 Mass. 634.

no party can be admitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser. The reason of the rule is, not because they might not, in many instances, make fair and honest disposition of it to themselves, but because the probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely than to assume them to be valid except where they can be proved to be fraudulent.[1]

A trustee is not barred from ever becoming a purchaser of what had once been part of the trust estate. When the title of the trust estate has passed by a valid sale, in which the trustee has no interest, and all interest of the *cestui que trust* in it has ceased, the trustee becomes a stranger to the property, and may purchase it like any other stranger.

The principles which prohibit the trustee from becoming a purchaser extend to all sales of the trust property, whether made by the trustee himself under his powers as trustee, or under an adverse proceeding. As a general trustee of the subject it is his duty to make it bring as much as possible at any sale that may take place, and therefore he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.[2]

Continued — Exceptions to and qualifications of the rule. — The above remarks, though stating the generally received doctrine, are yet subject to many qualifications growing out of the statutes and their judicial interpretation, and while they still apply in all their pristine vigor to a large class of fiduciary relations, to certain others their effect has been greatly modified. Thus, a purchase of land by an executor, at his own sale, directly or indirectly, is not ordi-

[1] Cook v. Berlin Mill Co., 43 Wis. 433; Story's Eq. § 310; Grumley v. Webb, 44 Mo. 444; Blauvelt v. Ackermann, 20 N. J. Eq 141; Railroad Co. v. Railroad Co., 19 Gratt. (Va.) 592; Boerum v. Schenck, 41 N. Y. 182; Roberts v. Roberts, 65 N. C. 27; McGowan v. McGowan, 48 Miss. 553; Goodwin v. Goodwin, 48 Ind. 584; Sheldon v. Rice, 30 Mich. 296.

[2] Martin v. Wyncoop, 12 Ind. 266.

narily void, but only voidable at the option of the heirs or beneficiaries seasonably expressed.[1] A clear and unequivocal affirmance of the sale, which must be *bona fide*, may conclude the beneficiary, if under no disability and in full knowledge of the facts, and the acceptance of proceeds by the beneficiary would, in general, amount to an affirmance.[2]

A marked exception to the rule is also made in favor of guardians *ad litem*. Unlike other guardians and ordinary trustees, a guardian *ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property which may be sold in the suit or proceeding in which he acts. If he has fairly advised the court of the infant's rights, and done all for him that the facts of the case required him to do, he may purchase and hold, in his own right, the property of the infant sold under an order of the court in the cause in which he was appointed, provided such purchase was in good faith, and for a full and valuable consideration paid by him.[3]

(b) *Conveyances by Executive and Ministerial Officers.*

Sources of authority.—The second class of fiduciary vendors comprises all persons who act under judicial or statutory authority, and whose deeds result from sales made in pursuance of some statutory direction, or the order of some tribunal of competent jurisdiction. The former are usually termed *execution* sales, the latter *judicial* sales.[4]

[1] Frazer v. Lee, 42 Ala. 25; Smith v. Granberry, 39 Ga. 381; Williams v. Rhodes, 81 Ill. 571; Froneberger, v. Lewis, 70 N. C. 456; Dodge v. Stevens, 94 N. Y. 209.

[2] Boerum v. Schenck, 41 N. Y. 182; Brantley v. Cheeley, 42 Ga. 209; Scott v. Mann, 33 Tex. 721.

[3] Marsh v. Marsh, Am. Law Rec., Nov., 1875.

[4] The chief differences between execution and judicial sales are: The former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter the court; in the former the sale is usually complete when the property is struck off to the highest bidder, in the latter it must be

Sales made under an execution must conform, in all respects, with the rules which the law lays down for the protection of the debtor. If not so made, they may be held irregular and void. But sales made under the decree of a court are, to a considerable extent, under the discretionary control of the court, which often sets them aside, although no error or irregularity has been committed, merely for the sake of an advance in the price; or which may, if satisfied that no injustice has been done, disregard irregularities in the conduct of the sale, and confirm the action of the master or other officer making same.[1]

Execution Sales. — At common law a judgment created no lien on real property, nor could same be sold on execution. But as trade developed it became necessary, in the maintenance of commerce, to subject land to the payment of the owner's debts. This was accomplished in the reign of Edward I,[2] when a statute, usually called the statute *de mercatoribus*, was enacted, which authorized the judgment creditor to sue out the writ of *elegit*, by which the sheriff was required to have all of the debtor's goods liable to execution appraised and delivered to the creditor in satisfaction of his debt, and if insufficient for the purpose to deliver to him a moiety of the debtor's freehold estate until from the profits he should have full execution of his judgment. From this has been evolved the modern doctrine which permits an absolute sale of any interest the debtor may have in land.

Title under Execution Sale.—A purchaser at an execution sale succeeds to all the rights which the judgment debtor had,[3] and takes the same title possessed by him with all its imperfections and infirmities.[4] It is the policy of the law, however, to uphold and protect such titles; and though the deed purports to convey only "the right, title and interest"

reported to and approved by the court. Freeman, Void Jud. Sales, 14.

[1] Lasell v. Powell, 7 Coldw. (Tenn.) 277.

[2] 13 Edw. I, ch. 18.

[3] Morgan v. Bouse, 53 Mo. 219; Williams v. Amory, 16 Mass. 186.

[4] Hicks v. Skinner, 71 N. C. 539; Cameron v. Logan, 8 Iowa, 434; Bassett v. Lockard, 60 Ill. 164.

which the judgment debtor possessed or had in the land at date of the judgment, yet the purchaser under such a deed will take the entire title as against prior unrecorded deeds or equities of which he had no notice.[1] Nor will the purchaser be affected by any subsequent conveyance the debtor may have made, even though recorded, for the sale on execution relates back to the time when the judgment became a lien and cuts off all intermediate interests.[2]

The title so acquired may be sold and conveyed, even pending an appeal,[3] and a reversal of the judgment for error, where the court had jurisdiction of the subject-matter and the parties,[4] will not materially affect same; for it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution of the purchase-money, and the purchaser shall hold the property sold, except where the plaintiff in the judgment becomes purchaser, and still holds the title.[5] In this latter event the title acquired under such judgment is divested by the reversal.[6]

Sheriff's deed — On execution. — A sheriff's deed made in pursuance of a sale on execution must be to the person to whom the certificate of purchase was issued or to his assignee, and if the deed is made to another, though it recites that he is the assignee of the certificate, it is a nullity if, in fact, the certificate was not assigned.[7]

To establish a title to land under a sheriff's sale on execu-

[1] Harpham v. Little, 59 Ill. 509.

[2] Kirk v. Vanberg, 34 Ill. 440.

[3] The issue of an execution on a judgment, pending an appeal, is irregular, but not void, and a sale of land under such an execution is subject to be set aside, on motion made in proper time by the defendant whose land has been sold; but no one except the defendant in the execution can question the sale for irregularity, however gross, and if not so set aside, the sale will pass the defendant's interest in the land. Shirk v. Gravel Road Co. 110 Ill. 661.

[4] Feaster v. Fleming, 56 Ill. 457; Hobson v. Ewan, 62 Ill. 146.

[5] Fregus v Woodworth, 44 Ill. 374; Mansfield v. Hoagland, 46 Ill. 359. In this event the sale is usually void under special statutes. See Hutchens v. Doe, 3 Ind. 528. But compare Gossom v. Donaldson, 18 B. Mon. (Ky.) 230.

[6] Powell v. Rogers, 105 Ill. 318.

[7] Carpenter v. Sherfy, 71 Ill. 427. Compare Bowman v. Davis, 39 Iowa, 398.

tion, all that is necessary to be shown, as a general rule, is a valid judgment, or, as has been held, a judgment by a court of competent jurisdiction, no matter if it be erroneous on its face,[1] execution duly issued,[2] and a sheriff's deed.[3] But in all cases the judgment is the foundation of the title,[4] and proof of same is indispensable to its validity.[5]

As the sheriff is only the executor of a naked power, it is necessary that the deed show substantial compliance with the terms creating the power as well as its proper execution; yet the recitals of a sheriff's deed are to be regarded only as inducement,[6] and where the same substantially complies with the statutory requirements, it is not invalidated by ambiguous recitals or omissions which do not mislead.[7] It is said that the statute requiring recitals in a sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and when such recitals are full, they dispense with the necessity of introducing the judgment and execution in evidence. So far as such a statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory;[8] and where the deed discloses sufficient to show the authority to sell, even though the particular judgment and execution be not recited, so long as it appears to be by virtue of a judgment and execution, the sale and conveyance will be valid if, at the time of such sale, the sheriff had in his hands a valid execution.[9]

[1] Mayo v. Foley, 40 Cal. 281. And see Den v. Taylor, 16 N. J. L. 532.

[2] Fisher v. Eslaman, 68 Ill. 78; Den v. Despreaux, 12 N. J. L. 182.

[3] Riddle v. Bush, 27 Tex. 675; Hughes v. Watt, 26 Ark. 228; Splahn v. Gillespie, 48 Ind. 397; Lenox v. Clark, 52 Mo. 115.

[4] Atkins v. Hinman, 2 Gilm. (Ill.) 437; Leland v. Wilson, 34 Tex. 79; Todd v. Philhour, 24 N. J. L. 796.

[5] Carbine v. Morris, 92 Ill. 555.

[6] Leland v. Wilson, 34 Tex. 79.

[7] Allen v. Sales, 56 Mo. 28; Jones v. Scott, 71 N. C. 192; Loomis v. Riley, 24 Ill. 307; Keith v. Keith, 104 Ill. 397.

[8] Clark v. Sawyer, 48 Cal. 133; Jordan v. Bradshaw, 17 Ark. 106; Holman v. Gill, 107 Ill. 467.

[9] Jones v. Scott, 71 N. C. 192; Clark v. Sawyer, 48 Cal. 133.

Defects of form are leniently regarded, and the instances are very rare in which a deed, issued in pursuance of an execution or chancery sale, is void for errors, defects or mistakes in form.[1]

Continued — Acknowledgment.— Unlike voluntary conveyances between individuals, it is essential to the validity of a sheriff's deed, for land sold by him under an execution, that it should have been legally acknowledged. It is true that a sheriff's deed gives the vendor an inceptive interest in the land, but he has no right to enter, and no claim upon the property, as against the former owner, until after the deed is acknowledged. The property is conveyed against the will of the judgment debtor; the conveyance is not his act, but the act of the law; and the law, when acknowledgment is requisite, must be strictly complied with.[2] Where the acknowledgment is defective the deed is not aided by record.[3] Proof of official character is rarely necessary, however, for the law recognizes such officers as sheriffs and deputy sheriffs, and instruments executed by them in the course of their official duties are usually sufficient in themselves to prove that they were the officers, in fact and in law, which by their acts they profess to be.[4]

Continued — Operation and effect.— A sheriff's deed is *prima facie* evidence that the grantee holds all the title and interest in the land that was held by the judgment debtor at the time of the rendition of the judgment, and operates back, by relation, to the date of such rendition so as to extinguish all rights and equities in and to the premises derived from the judgment debtor in the meantime.[5] And not only

[1] Freeman, Void Jud. Sales, § 45. The deed, however, must be what it purports to be; hence, a deed lacking a seal conveys no title. Hinsdale v. Thornton, 74 N. C. 167; Kruse v. Wilson, 79 Ill. 233.

[2] Ryan v. Carr, 49 Mo. 483; Adams v. Buchanan, 49 Mo. 64. But see, *contra*, Stephenson v. Thompson, 13 Ill. 186, where it is held that the deed may be proved by other evidence, and though unacknowledged it is still valid.

[3] Samuels v. Shelton, 48 Mo. 444.

[4] Ochoa v. Miller, 59 Tex. 460.

[5] Shields v. Miller, 9 Kan. 390; White v. Davis, 50 Mo. 333; Ferguson v. Miles, 3 Gilm. (Ill.) 358; Miller v. Wilson, 32 Md. 297; Kirk v. Vanberg, 34 Ill. 440.

the entire interest of the judgment debtor passes by the deed, but also such covenants of title as run with the land.[1] If made to a *bona fide* purchaser, and regular in itself, it is effectual as a conveyance, and cannot be impeached in any collateral proceeding for mere irregularity in any of the proceedings, judgment, execution or return.[2]

It will operate against the judgment debtor by estoppel, and he will be precluded from setting up an outstanding title to avoid the sale by the sheriff, or to deny the title thereby acquired by the purchaser.[3]

The recording of a sheriff's deed operates as constructive notice only to those who hold or claim under the judgment defendant; strangers, and those claiming under an independent or hostile title, are not affected thereby.[4]

Statutory Sheriff's Deeds.— To overcome the effect of misrecitals, prevent collateral impeachment, and give the full desired effect of conveyances by the sheriff, the legislatures of a majority of the states have prescribed certain forms of official deeds and declared their legal effect. As in case of statutory forms of deeds between indviduals, these conveyances contemplate but little verbiage, while the statute supplies what was formerly obtained by long and tedious recitals.

Judicial sales — How conducted.—Judicial sales are usually conducted by an agent of the court, who is required, as a rule, to expose the property in question at public vendue, proper notice of the time and place being first given in such manner as the court may direct, and to dispose of same to

[1] Whiting v. Butler, 29 Mich. 122; White v. Whitney, 3 Met. 81; Leport v. Todd, 32 N. J. L. 124.

[2] Landets v. Brant, 10 How. 371; Draper v. Bryson, 17 Mo. 71; Maurior v. Coon, 16 Wis. 465.

[3] Matney v. Graham, 59 Mo. 190; Reid v. Heasley, 2 B. Mon. (Ky.) 254; Jackson v. Bush, 10 Johns. 223; Jackson v. Hagaman, 1 Wend. 502; Gould v. Hendrickson, 6 Ill. 599. But see Kenyon v. Quinn, 41 Cal. 325, where it is held that a statutory provision to the effect that a conveyance of land in fee-simple shall convey the legal estate afterward acquired by the grantee has no application to a sheriff's deed made under execution sale.

[4] Gardner v. Jaques, 42 Iowa, 577.

the highest bidder. Circumstances may furnish exceptions to this general rule and allow of a private sale, but usually a competitive bidding of some kind is required. Where the sale is conducted by an agent — master in chancery, commissioner, or other officer — the agent acts simply as an intermediary; that is, to bring the parties together and make the contract of sale. When this has been done, as where the property has been offered at public auction and struck off to the high est bidder, he reports his actions in the matter to the court which either *confirms* or *disaffirms* the sale. If the sale is confirmed the master or commissioner is then authorized to execute a deed, the practical result of the whole proceeding being that the master acts as a sort of an agent to bring about, through the court, a conveyance by deed from the defendant owner to the purchaser.[1]

Continued—Validity and effect.— A sale of land under a judgment or decree must be made in the manner and on the terms prescribed in such judgment or decree;[2] and the confirmation by the court cannot, it seems, cure the invalidity of a sale not so made.[3] But a sale will not be disturbed unless the party suing can show an injury resulting to him from the sale,[4] as well as an interest in the subject-matter,[5] while it is always the policy of the law to uphold judicial sales and to protect the rights of purchasers under them;[6] and although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment was in force, and which it authorized,

[1] See Danl. Ch. Pr. 1447.

[2] Langsdale v. Mills, 32 Ind. 380.

[3] Bethel v. Bethel, 6 Bush (Ky.), 65. But this will only apply to gross departures; mere irregularity is generally cured by confirmation. Williamson v. Berry, 8 How. 546; Koehler v. Ball, 2 Kan. 160. Void sales, whether execution or judicial, are classed by Mr. Freeman as (1) those which are void because the court had no authority to enter the judgment or order of sale; (2) those which, though based on a valid judgment or order of sale, are invalid from some vice in the subsequent proceedings. Freeman, Void Jud. Sales, 15.

[4] Matter of Gilmer, 21 La. An. 589.

[5] Nixon v. Cobleigh, 52 Ill. 387.

[6] Dorsey v. Kendall, 8 Bush (Ky.) 294; Allman v. Taylor, 101 Ill. 185.

will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale;[1] for where the court has jurisdiction of the parties and of the subject-matter of the litigation, no matter how erroneously it may thereafter proceed, within the bounds of its jurisdiction its decree will be conclusive until reversed or annulled in some direct proceeding, and the title to property acquired at a sale under such decree, by a stranger to the record, will be upheld, although the decree itself may afterward be reversed for manifest error.[2]

Title under Judicial Sale.—The title acquired under a sale by order of the court differs in no material respect from that derived under execution sale. The purchaser is entitled to the interest of all the parties to the suit and to the interest of those who have purchased *pendente lite* from any of the parties.[3] He acquires no new rights, nor does the fact that the court is regarded as the vendor [4] confer upon him any superior equities. A court of equity does not insure the title to real property sold under its decrees,[5] and the purchaser buys, presumably, with full knowledge of all defects and pre-existent liens;[6] he is bound to examine the title or purchase at his peril, and if he buys without an examination and obtains no title, he must, as a general rule, suffer the loss arising from his neglect, unless fraud or mistake has entered into the transaction.[7] Prior to confirmation he has no independent rights, but is regarded as a mere proposer;[8] after confirmation his rights become vested and the sale will not be set aside except for fraud,

[1] Gray v. Brignardello, 1 Wall. 627; Fergus v. Woodworth, 44 Ill. 374.

[2] Allman v. Taylor, 101 Ill. 185.

[3] Harryman v. Starr, 56 Md. 63.

[4] Parrat v. Neligh, 7 Neb. 546; Thompson v. Craighead, 32 Ark. 291.

[5] Gunton v. Zantzinger, 3 MacArthur (D. C.) 262.

[6] Housley v. Lindsay, 10 Heisk. (Tenn.) 651; Guynn v. McCauley, 32 Ark. 97; Capehart v. Dowery, 10 W. Va. 130; Watson v. Hoy, 28 Gratt. (Va.) 698.

[7] Tilley v. Bridges, 105 Ill. 336.

[8] State v. Roanoke Nav. Co., 86 N. C. 408.

mistake, surprise, or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court.[1] Where a deed has issued in pursuance of a sale it is competent for the court to put the purchaser in possession, and if his entry is obstructed the court will grant him a writ of assistance.[2]

Neither will the title of an innocent purchaser, a stranger to the record, be affected by the subsequent reversal of the decree for irregularity;[3] but where the purchaser was an original plaintiff in the suit, or an assignee of the judgment or decree, he acquires only a defeasible title, which may be defeated by a subsequent reversal, and the same rule obtains whether the reversal is based on an amendable defect or one that is incurable.[4]

Order of confirmation.—After the sale, and before the execution of a conveyance, in all cases of judicial sales, a return or report of sale must first be made to the court which ordered the same, which upon examination, if the proceeding is regular, approves and confirms the action of the officer who made the sale. Until this has been done the sale is incomplete, and confers no rights on the purchaser.[5] In judicial sales a confirmation is rendered necessary from the fact that the court, and not the officer making the sale, is the vendor,[6] and confirmation is regarded as the final consent; but even where there has been no confirmation, if a deed has been made and delivered, and there has been a

[1] Berlin v. Melhorn, 75 Va. 639.

[2] This is frequently done in foreclosure sales where the defendant refuses to vacate. See Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609.

[3] Sutton v. Schonwald, 86 N. C. 198.

[4] McDonald v. Life Ins. Co., 65 Ala. 358; Fishback v. Weaver, 34 Ark. 569.

[5] Busey v. Hardin, 2 B. Mon. (Ky.) 407; Bank v. Humphreys, 47 Ill. 227; Williamson v. Berry, 8 How. 547; Thorn v. Ingram, 25 Ark. 52; Valle v. Fleming, 19 Mo. 454; Hunting v. Walter, 33 Md. 60. Approving the sale makes the officer's act that of the court, and where, upon such approval, he is ordered to make a deed, no order confirming the deed is necessary. McHany v. Schenk, 88 Ill. 357.

[6] Thompson v. Craighead, 32 Ark. 291.

possession and holding thereunder, time may, if sufficiently long, operate to confirm and ratify the sale and perfect the title of the purchaser.[1]

Sheriff's deed — Under decree. — Though a master, commissioner or referee is the medium through which a court of chancery ordinarily executes it decrees, the duty not infrequently devolves upon the sheriff either by virtue of his office or through special appointment. While acting under a decree he occupies the same position as a commissioner, and is but a ministerial officer of the court, to which he must make reports of his acts and by whom they must be confirmed before conveyances can be lawfully made.[2]

Master's, commissioner's and referee's deeds. — Where lands are sold by order of court, although the sheriff is a proper person to make the sale, the court has discretionary power to appoint a commissioner, master in chancery, or other officer of the court, or any fit and proper person to conduct same. In practice such sales are usually intrusted to a master, or such corresponding officer as local procedure may indicate, who also executes the deed of conveyance.

Such deeds are without warranty or any terms except those imposed by law, and convey only such titles as the defendants possessed. They take effect as conveyances in the same manner as deeds between individuals.

Administrators' deeds. — An administrator is regarded as an executive officer of the court, while he also occupies the relation of trustee to the estate, its creditors and distributees.[3] Although he may not possess as much power as an executor, the latter deriving his power from the testator and the law, and the administrator from the law only,[4] he yet possesses all necessary power to sell property, negotiate securities, and

[1] Gowan v. Jones, 18 Miss. 164. And see Rorer, Jud. and Ex. Sales, 57.

[2] Taylor v. Gilpin, 3 Met. (Ky.) 544; Hunting v. Walker, 33 Md. 60.

[3] Wingate v. Pool, 25 Ill. 118; State v. Meagher, 44 Mo. 356.

[4] Gilkey v. Hamilton, 24 Mich. 283.

to settle and pay debts,[1] but under the order and direction of the court. He takes neither an estate, title or interest in the lands of his intestate,[2] but a mere naked power to sell for specific purposes.[3] He takes the land as he finds it,[4] and, having no interest therein, can maintain no action to perfect the title or relieve it of any burden,[5] and must sell it as he finds it.[6]

An administrator's deed derives its primary validity from the order of the court directing the sale of the land in question.

The power to sell is a personal trust which cannot be delegated,[7] and, the sale being a fiduciary act based upon statute, must show affirmatively a strict compliance with the law.[8]

The doctrine of *caveat emptor* applies to all sales by the administrator,[9] and the purchaser, who is persumed to have made all necessary inquiries, takes the title at his peril,[10] and subject to all liens, except those for the payment of which the land is sold.[11] The purchaser has no right to the land until the sale has been confirmed;[12] but where the sale has been made under a proper order of the court, and reported to and confirmed by it, it conveys title even though the proceedings be irregular.[13]

[1] Walker v. Craig, 18 Ill. 116. Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities; and ordinarily, only so much should be sold as is necessary for that purpose. Newcomer v. Wallace, 30 Ind. 216; Foley v. McDonald, 46 Miss. 238.

[2] Ryan v. Duncan, 88 Ill. 144; Stuart v. Allen, 16 Cal. 473.

[3] Smith v. McConnel, 17 Ill. 135; Floyd v. Herring, 64 N. C. 409.

[4] Gridley v. Watson, 53 Ill. 186.

[5] Le Moyne v. Quimby, 70 Ill. 399; Ryan v. Duncan, 88 Ill. 146.

[6] Martin v. Beasley, 49 Ind. 280.

[7] Chambers v. Jones, 72 Ill. 275; Gridley v. Philips, 5 Kan. 349.

[8] Fell v. Young, 63 Ill. 106; Lockwood v. Sturdevant, 6 Conn. 386; Corwin v. Merritt, 3 Barb. 341. An administrator's deed for land is not admissible as evidence without proof that the maker was administrator. Ury v. Houston, 36 Tex. 260.

[9] McConnell v. Smith, 39 Ill. 279.

[10] Bishop v. O'Connor, 69 Ill. 431.

[11] Henderson v. Whitinger, 56 Ind. 131.

[12] Mason v. Osgood, 64 N. C. 467; Rawlings v. Bailey, 15 Ill. 178; Ury v. Houston, 36 Tex. 260.

[13] Thorn v. Ingram, 25 Ark. 52; Myer v. McDougal, 47 Ill. 278. Compare Chase v. Ross, 36 Wis. 267.

Guardians' deeds.— Guardians[1] and conservators[2] frequently make conveyances of the real estate of their wards, either to pay debts, or for the support and education of the ward, or for the purpose of investing the proceeds; and such conveyances, if attended by all the statutory requisites, are effectual to convey all the title which the ward may have possessed at the time of the sale.[3] Such sales are made by the authority and under the direction of the probate court upon petition by the guardian stating the necessary jurisdictional facts,[4] and after notice of such application in the manner provided by law.[5] Such sales must be further reported to and confirmed by the court granting the license,[6] but the title of the ward will not be divested until a deed has been ordered and actually executed.[7]

[1] The common law recognized four kinds of guardians, to wit: in chivalry, by nature, in socage, and by nurture. The distinctions do not and never have existed in the United States The statutory guardianship is the only kind which figures in land titles.

[2] The estate, and frequently the person as well, of persons *non compos mentis* is often confided to the care of a statutory guardian, generally called a conservator or committee.

[3] Wisenor v. Lindsay, 33 La. An. 1211; Mulford v. Beveridge, 78 Ill. 445; Fitzgibbon v. Lake, 29 Ill. 165.

[4] The petition is of paramount necessity, and it seems that without such a petition the court gets no jurisdiction to grant a license to sell. Ryder v. Flanders, 30 Mich. 336.

[5] The notice is jurisdictional, and a sale without giving the statutory notice has been held absolutely void. Rankin v. Miller, 43 Iowa, 11; Kennedy v. Gaines, 51 Miss. 625. If, however, the notice is defective merely, the jurisdiction is saved. Lyon v. Vannatta, 35 Iowa, 521.

[6] Confirmation is essential to the validity of the sale. People v. Circuit Judge, 19 Mich. 296; White v. Clawson, 79 Ind. 188; Chapin v. Curtenius, 15 Ill. 427.

[7] Doe v. Jackson, 51 Ala. 514.

CHAPTER VIII.

TESTAMENTARY CONVEYANCES.

Nature and theory of wills—Testamentary capacity—Formal parts of wills—Execution and revocation—Construction, operation and effect—Method and effect of formal proof. This chapter discusses wills only as operative instruments of conveyance of real property.

Generally considered. — The last mode of conveyance of real property for us to consider is by *devise*, or disposition by *last will* and *testament*.[1] The word "devise" seems to be derived from divide, and originally meant any kind of division or distribution of property.[2]

It would seem that the power of devising lands existed in England during the time of the Saxons,[3] but upon the establishment of the Norman dynasty it was suppressed as inconsistent with the principles of the feudal law,[4] and the privilege of testamentary disposition was not restored until many years after the removal of restraints on alienation by deed.[5] The power was indirectly acquired by means of the invention of uses, the theory being that a will operated as a declaration of uses, taking effect at or after the death of the testator, and subject to the same rules as regulated the creation of uses by transactions operating *inter vivos;* and so the practice of devising the use of land eventually became quite common, but the enactment of the statute of uses effectually destroyed this power.[6] The inconveniences which attended

[1] See p. 172, *ante*.

[2] Cruise, Dig., tit. 38, ch. I.

[3] But very little is known concerning this, however, and the right, if it existed, was probably confined to the thanes or great lords.

[4] It is said that the inhibition arose partly from apprehension of imposition on persons in their last moments, but a stronger reason is found in the fact that there could be no livery of seizin nor that publicity and notoriety which the common law required in all transfers of land.

[5] Spence, Eq. Jur. 20; 4 Kent Com., lect. 68.

[6] It appears from the title and preamble of the statute of uses

this restraint resulted, a few years afterward, in a partial liberty of disposition by will, and subsequently all restraints were removed.

The idea of a devise is thought to have been taken from the *testament* of the Roman law, which was at all times allowed in England with respect to personal property.[1] But while the two methods are founded on different principles, and originally were governed by different rules, no distinction is now made between them, and all writings intended for *post-mortem* operation are called *wills* and *testaments*, whether relating to real or personal property, or both.

As a general rule any person capable of making a conveyance by deed may execute an effective will, and the observations heretofore made with respect to parties to deeds will apply in the main to testamentary conveyances. There is, however, one phase of the subject which acquires an additional force where the grantor conveys by way of devise and this will be considered in the succeeding paragraph.

Testamentary Capacity.—It is a cardinal rule that to enable a testator to make a valid will he must be of "sound mind and memory," or, as it is sometimes stated, of "sound and disposing mind." That is, he must possess the requisite degree of intelligence or mental capacity to enable him to understand the purport of his act, both with respect to the property in his disposal and the objects of his bounty.[2] So too, his mind must be free from insane delusions that might influence him in the disposal of his property or prevent the

that one of its principal objects was to abolish the power of disposing of interests in land by will, and thereby to restore to the king and the great lords the feudal dues which they could not claim if the estate of the heir was defeated by a devise. Digby Hist. Real Prop. 376.

[1] Cruise, Dig., tit. 38, ch. I. The word "testament" in the Roman law was applied only to dispositions which contained an appointment or institution of an heir, who was to take all the property of the testator. See Sandars' Justinian, 235; Morey's Roman Law, 313.

[2] Brown v. Mitchell, 75 Tex. 9; Delafield v. Parish, 25 N. Y. 10; but compare St. Legers' Appeal, 34 Conn. 434; *re* Silverthorn, 68 Wis. 372; Campbell v. Campbell, 130 Ill. 466.

natural exercise of his faculties.[1] It is difficult, if not impossible, to lay down arbitrary rules with respect to mental capacity and in the consideration of the question a large allowance must always be made for the differences of individual character. The authorities are agreed, however, that where a will has been executed under a delusion which operated upon the testator and induced him to make it, such will cannot be sustained, notwithstanding the testator's general capacity is unquestioned.[2]

It is a further principle that a will should be the voluntary expression of the decedent's own wishes; hence, undue influence or fraud in its procurement will rob it of this essential character. Undue influence exists wherever through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another the latter obtains an ascendency which prevents the former from exercising an unbiased judgment. To effect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of execution. Of course such an instrument is not the will of the testator and cannot be sustained as such in a legal tribunal.[3]

Theory of Wills.—There is some confusion in the books with respect to the exact nature of a will and the character to be assigned to a devise. The questions growing out of this conflict of views were incidentally discussed in treating of title by devise and a reference to what is there said may be advantageously made in this connection.[4] In this work the author has steadfastly adhered to the proposition that a will is a conveyance—not merely a form of disposition, but a substantive instrument of conveyance operating in practically the same manner as a deed but taking effect differently, and this now seems to be the position of the majority of those who have written upon the subject.

[1] Florey v. Florey, 24 Ala. 241; Brown v. Ward, 53 Md. 376; and see 1 Redf. Wills, 86.

[2] Clapp v. Fullerton, 34 N. Y. 190; and see Schouler Wills, § 159.

[3] Herster v. Herster, 122 Pa. St. 293; Griffith v. Defenderfer, 50 Md. 466.

[4] See p. 172, *ante*.

In its popular acceptation a will is a disposition to take effect *after* the death of the donor, and has been so defined by many lexicographers and institutional writers.[1] But this view, while perhaps consistent with the theory of "testamentary succession," is incompatible with the notion that a will is a conveyance—that is, a gift from one person to another. Hence we must regard it as a disposition to take effect *at* death and not after. The legal theory is that the making of a will is an act of gift; that unlike a similar act of gift by deed, which takes effect presently, the act is simply a continuing offer which is revocable up to the moment of death, at which time it takes effect. The theory is fully in consonance with legal reason and obviates the incongruity which the old definition entails, to wit; that a dead man can give to the living. It is fundamental that to every grant there must be a grantor. This character cannot be assigned to one who no longer exists.

Division of the subject.—The limits of this work preclude more than a casual glance at this very comprehensive subject, which will be accomplished by a brief consideration;

1. Of the making and revocation of wills;
2. Of their construction, operation and effect, and
3. Of the method and effect of their formal proof.

The power to make wills, the manner of their execution, the method of their proof, and the effect that shall be given to them, depend largely upon the specific provisions of the statute, but these provisions, in their essentials, are substantially the same in all of the states.

1. *Making and Revocation of Wills.*

Formal requisites.— Unlike deeds, which are drawn in conformity with legal or conventional precedents, wills may assume almost any shape. Modern wills, in many instances, and ancient wills uniformly, commence with a pious ejaculation, followed by a preamble dedicating the testator's soul to God, expressing the soundness of his mind, the health or

[1] Redfield and Jarman both so define it.

debility of his body, and other particulars of no special importance, which may, in all cases, be safely omitted. Immediately following is usually a direction for the payment of debts and funeral expenses. This, too, is merely formal and immaterial, except that it may sometimes aid in the construction of a will by showing that the subject of his debts was brought distinctly to the testator's mind at the time of the execution of same.[1] Then come the bequests and devises, which are the important parts, and finally the nomination or appointment of the executor. An orderly will should conclude with a testimonium, but this is simply a matter of neat drafting and by no means essential.

With respect to the strictly formal parts a very simple and informal document will be sustained as a will, where the writing relied on has been executed in conformity to the statute, and shows upon its face a declaration by the testator that same is his will.[2] The essence of a will is, that it is a disposition to take effect at death, and the form of the instrument, therefore, is immaterial if its substance is testamentary.[3]

But while the law allows a wide latitude in this respect it is yet desirable that a will should display some art in its general arrangement and that the conventional forms which long usage has prescribed should, as far as possible, be followed. If the dispositions are other than direct gifts the phraseology should be carefully framed and the technical words which have acquired a definite legal significance should be employed.

The residuary clause.—In every properly drawn will there should be inserted at the close a general devise, or a

[1] 1 Redf. Wills, *674.

[2] 3 Wash. Real Prop. *681; Turner v. Scott, 51 Pa. St. 126; Burlington University v. Barrett, 22 Iowa, 60; Wall v. Wall, 30 Miss. 91. Although an instrument be in the form of a deed, and called such, still if its purpose be testamentary, and it is only to be consummated by the death of the maker, effect will be given to it as a will and not as a deed. Gillham v. Mustin, 42 Ala. 365.

[3] Wilson's Ex'rs v. Van Leer, 103 Pa. St. 600. Thus, a will in the form of a letter has been given effect; Estate of Knox, 131 Pa. St. 217.

disposition in general terms, of everything that the testator has not succeeded in disposing of in former parts of the will, which is called the *residuary clause*. The object of the residuary clause is to prevent a partial intestacy arising from any cause, and the person to whom such final gift is made is called the *residuary devisee*. Where the language of a residuary clause has sufficient scope and extent, evincing the intent of the testator to take up and carry into the residuary estate all of his property remaining at his death undisposed of for any reason, the residuary clause will receive and pass a lapsed legacy and devise,[1] as well as such as may fail for want of use of proper language to create the same, or to designate the devisee.[2]

But when the residuary clause does not by its own terms take in a lapsed legacy or devise, so as to disclose the intent of the testator to pass the lapsed estate into the residue, the rule is different.[3]

Void and illegal legacies or devises come under the rule first above stated,[4] and generally, unless a contrary intention is manifested, the residuum will take and pass everything of the nature above indicated.[5]

A different rule, however, applies to the residue itself; for if a gift of the residue, or any part of it, fails, whether by lapse, illegality or revocation, to the extent that it fails the will is inoperative, and the subject of the gift passes to the heirs of the deceased according to the statute of descents.[6]

Execution.—The statute usually requires the paper to be *signed* by the testator, but the signature may be original or

[1] Youngs v. Youngs, 45 N. Y. 254; Patterson v. Swallow, 8 Wr. (Pa.) 490; Hillis v. Hillis, 16 Hun (N. Y.), 76. Local statutes will sometimes materially affect the doctrine stated in the text.

[2] Lovering v. Allen, 129 Mass. 97.

[3] Yard v. Murry, 86 Pa. St. 113.

[4] Burnet v. Burnet, 30 N. J. Eq. 595. A distinction is made in some states between legacies and devises: the legacy falling into the residuum; the lapsed devise descending to the heirs. See Orrick v. Boehm, 49 Md. 2.

[5] Thayer v. Wellington, 9 Allen (Mass.) 283. The residuary clause will carry the estate devised in a clause which the testator has revoked by striking it out of his will. Biglow v. Gillott, 123 Mass. 102.

[6] Burnet v. Burnet, 30 N. J. Eq. 595.

by adoption,[1] that is, by his own hand or by the hand of some other person acting for him, in his presence, and at his special instance and request.

By signature is meant ordinarily the name of the signer, yet in the construction of wills what shall constitute a sufficient signature must depend largely on the custom of time and place, and the circumstances of each particular case. Where the statute does not specifically define the character of the signature the utmost liberality is allowed, hence a mark,[2] even though accompanied by a wrong name, or initials, or even the first name only, if shown to have been appended for the purpose of consummating or completing the testamentary act may be sufficient.[3]

As to the place of signing the authorities are not in accord. It was formerly held that the signature of the testator in any part of the instrument was sufficient,[4] and hence the mere recital of the testator's name in the introductory clause was permitted to have the effect of a signature,[5] the intention being manifest. Experience having demonstrated the danger of having a mere memoranda or incomplete directions taken for the expression of final intention, the legislatures of many of the states have provided that the instrument shall be signed at the end, and where this provision prevails the requirement must be met without regard to intention.[6]

Attestation.—A will must be *attested* by two or more subscribing witnesses, who, at the testator's request, affix their signatures in his presence.[7] The statutory require-

[1] Armstrong v. Armstrong, 29 Ala. 538; Waite v. Frisbie, 45 Minn. 361. But see Fritz v. Turner, 46 N. J. Eq. 515.

[2] A mark has been held a good signature even when the statute uses the word *subscribed*. Van Honswyck v. Wiese, 44 Barb. 494; Jackson v. Jackson, 39 N. Y. 153.

[3] See Knox's Estate, 131 Pa. St. for an instructive discussion of this interesting topic.

[4] Redf. Wills, ch. VI, and cases cited.

[5] Armstrong v. Armstrong, 29 Ala. 538.

[6] Consult local statutes. *In re* Booth, 127 N. Y. 109, is an instructive case on this point.

[7] Consnlt Hopper's Will, 1 Tuck. (N. Y. Sur.) 378; Lawrence's Will, id. 243; Holloway v. Galloway, 51 Ill. 159.

ments in this respect are not uniform, however, and while all unite in the formula last stated many provide other incidents as well. Usually the testator need not sign in the presence of the witnesses, although they must in his, but, as a rule, in requesting their attestation he must declare the instrument to be his last will and testament or acknowledge his signature to same. This is technically known as *publication*, or the giving of publicity to his act in order that the fact may be shown after his death.[1]

Codicils.—Where a testator, having duly executed and published a will, desires to make some addition to or qualification of the provisions of the instrument, and at the same time desires the will to stand as the manifestation of his last general intention, he may effect same by a supplementary writing called a *codicil*.[2] Where a codicil is in irreconcilable conflict with the will, it must prevail as a revocation, since it is the last expression of the testator's intent in the disposition of his property.[3] Ordinarily, however, a codicil imports not a revocation, but an addition to, or explanation or alteration of, the will, in reference to some particular, and assumes that in all other particulars it is to be in full force and effect.

The authorities fully establish the proposition that a codicil which does not in terms revoke a clause in the will, but modifies it in some of its features entirely consistent with the retention of its other provisions, will be allowed to have that partial effect, and the clause thus changed will remain as the embodiment and expression of the testator's intent; while if duly executed with all the formalities required by law, it will operate to confirm and republish the rest of the

[1] See Baskin v. Baskin, 36 N. Y. 416; Mundy v. Mundy; 15 N. J. Eq. 290.

[2] From the Latin *codicillus*, meaning literally a little code. It would seem that the term "codicil" was employed in the Roman law to indicate any disposition of property made in contemplation of death in which no heir was named. But the name only is taken from the Roman law; none of the incidents have been retained.

[3] Hallyburton v. Carson, 15 Reporter, 154.

will,[1] unless the testator declares that he does not intend that it shall have that effect.[2] It will thus be seen that the codicil plays a most important part both in the disposition of the property and in the matter of validating that which has preceded it, and which, by reason of defective execution or other circumstances, has become inoperative.[3]

It is an established rule not to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil,[4] and the intent of the testator is always sought to give effect to both instruments when they can operate in perfect harmony.[5] But where the absolute and unqualified gift in the codicil is incompatible with the disposition of the land made in the will, and must have a revoking efficacy or be itself nugatory, the will must yield to the codicil.[6]

A codicil depending upon the body of will for interpretation or execution cannot be established as an independent will, when the will itself has been revoked.[7]

Revocation.— As a will takes effect, or becomes operative, only upon the death of the maker, it follows that it may be altered or abrogated by him at any time during his life. This latter act is called *revocation.* At one time it would seem that wills might be revoked by spoken words only, but this was prevented by the statute of frauds, the substantial features of which have been re-enacted in all of the United States, and the rule now is that a will cannot be invalidated by the parol declarations of the maker, made either before or after its execution.[8]

As a general rule a will can only be revoked (1) by a subsequent will; (2) by a codicil; (3) by destroying, canceling

[1] O'Hara on Wills, 6; Brown v. Clark, 77 N. Y. 369; Van Cortlandt v. Kip, 1 Hill, 590; Mooers v. White, 6 Johns. Ch. 375; 1 Jarm. on Wills, 78.

[2] Van Cortlandt v. Kip, 1 Hill, 590.

[3] See Wms. on Executors, 97; 1 Jarm. on Wills, 78.

[4] Jarm. on Wills, 343, note.

[5] Hallyburton v. Carson, 15 Reporter, 154.

[6] Wainwright v. Tuckerman, 120 Mass. 232; Vaughan v. Bunch, 53 Miss. 513.

[7] Youse v. Forman, 5 Bush (Ky.), 337.

[8] See Dickie v. Carter, 42 Ill. 376.

or obliterating, or (4) by a change in the domestic condition of testator.[1]

It was formerly held that a subsequent will only operated as a revocation where it contained an express clause revoking all former wills or made a different and incompatible disposition of the lands devised by a former one.[2] This rule, while it has, in the main, been followed by American courts, is subject to some modification dependent upon disclosed intent, and usually a subsequent instrument, duly executed as a last will, and which is complete in itself and adequate for the disposition of testator's entire estate, will be construed as revoking all former wills, although no words to that effect are used.[3] Prudence would suggest, however, that in the draughting of wills a revocation of all former wills be expressly declared.

A codicil may have effect as a revocation, either in whole or in part, of the will to which it is annexed. See remarks under that head.

A will may be revoked by "burning, canceling, tearing or obliterating the same,"[4] if done with intent to revoke[5] — *animo revocandi;* but this effect will not be given to such acts when they result from accident or mistake.[6]

Marriage and birth of issue is by statute generally sufficient to work a total or partial revocation of a prior will, and apart from the statute subsequent marriage has been held to revoke a will where it contained no provisions showing a contemplation of the relations growing out of marriage.[7]

2. *Operation and Effect of Wills.*

Rules of construction.— Upon the ground that wills are often made in haste, and by inexperienced persons, a devise

[1] This matter is statutory, but the text states the statutory rule. See Stat. 29 Car. II, ch. 3, § 6.

[2] See Cruise, Dig., tit. 38, ch. VI.

[3] Clarke v. Ransom, 50 Cal. 595; Re Fisher, 4 Wis. 254; Simmons v. Simmons, 26 Barb. (N. Y.) 68. And see Redf. Wills, ch. VII.

[4] Stat. of Frauds, 29 Car. II.

[5] Avery v. Pixley, 4 Mass. 460; Dan v. Brown, 4 Cow. (N. Y.) 490.

[6] Wolf v. Bollinger, 62 Ill. 368; Dawson v. Smith, 3 Houst. (Del.) 335.

[7] See Board of Missions v. Nelson 72 Ill. 564; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506; Warner v. Beach, 4 Gray (Mass.) 162.

is not construed strictly and technically, like a deed, but liberally, and according to the intent of the testator, and such intent may be gathered, in case of doubt, not from detached clauses, but from the whole will, so that every word may have its effect, if possible.[1] It is a cardinal rule, however, in the construction of wills, that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed,[2] and technical words are presumed to be used in their legal sense, unless there is a plain intent to the contrary.[3]

The general intent will prevail over expressions indicating a different particular intent,[4] though every expressed particular intent must be carried out when it can be;[5] and when a will is susceptible of a twofold construction, one of which avoids and the other upholds it, the latter must be adopted.[6] The general rule, however, that wills are to be construed according to the intention of the testator must be understood as the intention of the testator as expressed in the will; and this must be judged of exclusively by the words of the instrument as applied to the subject-matter and the surrounding circumstances,[7] and not from extrinsic matter or evidence *aliunde*.[8]

[1] Welch v. Huse, 49 Cal. 507; Butler v. Huestis, 68 Ill. 594; Lytle v. Beveridge, 58 N. Y. 592; Moran v. Dillehay, 8 Bush, 434; Bergan v. Cahill, 55 Ill. 160.

[2] Luce v. Dunham, 69 N. Y. 36; Edwards v. Bibb, 43 Ala. 666; Mead v. Jennings, 46 Mo. 91; Feltman v. Butts, 8 Bush (Ky.) 115. Words may be considered in an order other than that in which they are placed, if the intent of the testator is better served thus. Ferry's Appeal, 102 Pa. St. 207.

[3] Butler v. Huestis, 68 Ill. 594; France's Estate, 75 Pa. St. 220; DeKay v. Irving, 5 Den. 646.

[4] Bell v. Humphrey, 8 W. Va. 1; Parks v. Parks, 9 Paige, 107; Schott's Estate, 78 Pa. St. 40; Watson v. Blackwood, 50 Miss. 15.

[5] Bell v. Humphrey, 8 W. Va. 1.

[6] Mason v. Jones, 2 Barb. 229.

[7] Bell v. Humphrey, 8 W. Va. 1; Wheeler v. Hartshorn, 40 Wis. 83; Blanchard v. Maynard, 103 Ill. 60.

[8] McAlister v. Butterfield, 31 Ind. 25; Brownfield v. Wilson, 78 Ill.

These are the basic principles that govern the construction of wills, and to them little can be added that is of general application. The donor of property by testamentary disposition has an almost unlimited scope within which to exercise his judgment or to gratify his caprice, and while multitudes of wills are daily presented for construction, it is seldom that we find any two of them exactly similar. Unlike deeds of conveyance in this respect, they are as multiform and distinct in their structure, phraseology and purposes as are the mental operations, motives and feelings of the different testators. The intention must, in all cases, be sought for, and if possible ascertained; and this intention, when it is not in conflict with the settled policy of law, will always be respected and allowed to operate.[1] Any construction which will result in partial intestacy is to be avoided, unless the language of the will compels it.[2]

Repugnancy.—It is a well established rule that where two or more provisions in a will are clearly repugnant or irreconcilable the latest should prevail,[3] as being indicative of the testator's latest wish;[4] yet it is a rule that is only ap-

467; Caldwell v. Caldwell, 7 Bush (Ky.) 515; Sherwood v. Sherwood, 45 Wis. 357. It is true that the condition of the testator at the time of execution, the state of his property, his family, and the like, may be shown in order to throw light upon his intention; yet as the writing is the only outward and visible expression of his meaning, no other words, as a rule, can be added to or substituted for those used. Hunt v. White, 24 Tex. 643; Mackie v. Story, 93 U. S. 589; Abercrombie v. Abercrombie, 27 Ala. 489; Herrick v. Stover, 5 Wend (N. Y.) 580. See, however, the succeeding section on "repugnancy."

[1] Douglas v. Blackford, 7 Md. 22.

[2] Vernon v. Vernon, 53 N. Y. 351; Cate v. Cranor, 30 Ind. 292. The state of the law at the time of the execution of a will often affords material assistance in arriving at the intention of the testator, when it would otherwise be doubtful; but the rights of parties taking under the will are always to be determined by the law as it existed at the time the will took effect. Carpenter v. Browning, 98 Ill. 282.

[3] Hamlin v. Express Co., 107 Ill. 443; Fulton v. Hill, 41 Ga. 554; Bradstreet v. Clarke, 12 Wend. (N. Y.) 602; Van Nostrand v. Moore, 52 N. Y. 12; Evans v. Hudson, 6 Ind. 293; Miller v. Flournoy, 26 Ala. 724; Pickering v. Langdon, 22 Me. 430.

[4] Rountree v. Talbot, 89 Ill. 246.

plied in cases of absolute necessity, as where the provisions are totally inconsistent with each other, and the real intention of the testator is incapable of determination.[1] A prior provision, however, will never be disturbed, further than is absolutely necessary to give effect to a subsequent one;[2] nor will the expression of a particular intent be sufficient to overcome the manifest general intent.[3] Thus, where there is a devise of an unlimited power of disposition of an estate in such manner as the devisee may think proper, a limitation over is inoperative and void, by reason of its repugnancy to the principal devise.[4]

Under the application of the rule that a will should be so construed as to effectuate the intention of the testator as far as possible, express words must sometimes yield to the otherwise manifest intention, and words will even be added where it is absolutely necessary to avoid absurdity or give effect to such manifest intention.[5]

Devises to heirs — Effect of. — It is a rule of the common law that where devisees under a will would take the same estate in quantity and quality which they would take from an intestate ancestor by operation of law, the title so derived is held by descent and not by purchase, and this rule may still obtain in some of the states.[6] But when one devises property to his heirs it is but fair to presume he

[1] Covenhoven v. Shuler, 2 Paige (N. Y.), 122; Oxley v. Lane, 35 N. Y. 340; Newbold v. Boone, 52 Pa. St. 167; Bartlett v. King, 12 Mass. 542; Thrasher v. Ingram, 32 Ala. 645; Siceloff v. Redman, 26 Ind. 251.

[2] Taggart v. Murray, 53 N. Y. 233; Kenzie v. Roleson, 28 Ark. 102; Parker v. Parker, 13 Ohio St. 95; Stickle's Appeal, 29 Pa. St. 234.

[3] Hamlin v. Express Co., 107 Ill. 443; Bell v. Humphrey, 8 W. Va. 1; Cook v. Holmes, 11 Mass. 528; Pickering v. Langdon, 22 Me. 413; Schott's Estate 78 Pa. St. 40; Watson v. Blackwood, 50 Miss. 15; Miller v. Flournoy, 26 Ala. 724.

[4] Hamlin v. Express Co., 107 Ill. 443.

[5] Welsch v. Savings Bank, 94 Ill. 191; Wright v. Dunn, 10 Wheat. 204; Bartlett v. King, 12 Mass. 537; Ruston v. Ruston, 2 Dall. 244.

[6] Donnelly v. Turner, 60 Md., 81. This seems to have been the view which formerly obtained in this country. Mr. Hilliard says: "A devise is void if made to the heir at law, and if it gives him the same estate which he would have

intended they should take the property under the will, and in furtherance of this principle the rule first stated has been set aside in a majority of the American states, and the devisees in such cases held to take by purchase and not by descent.[1] Where, however, the gifts to the heirs at law are made to them *simpliciter*, the persons to take and the proportions must be determined by the statutes of descent and distribution,[2] as, if a devise is made to the heirs at law of A, instead of naming or otherwise specifically designating the persons to take, the statute would have to be resorted to in order to fix the parties as well as the shares to which they would be entitled.

Words of grant.—As in deeds so in wills, there must be apt words of grant or conveyance or words indicative of testamentary intent, but any form of expression will be sufficient to pass title, provided the intent is manifest. "Give," "devise" or "bequeath" are the words commonly in use, and all or either will be sufficient to pass real estate, though the technical word for this purpose in a properly drawn will is "devise."[3] Words of advice, desire, recommendation, etc., or, as they are technically called, *precatory words*, are not ordinarily sufficient.[4]

Words of purchase and limitation.—The words used in connection with gifts to specific persons to show, as in case

inherited. In such case the heir takes by descent, which is a better title than that of a devisee; because an adverse claimant may enter upon the latter, but not upon an heir." 2 Hill. Abridg. 514. But this doctrine is not now recognized.

[1] Gilpin v. Hollingsworth, 3 Md. 190. When heirs take by purchase they do not take as heirs, but as a class of persons to whom by that means the testator has selected to devise his property; and as they take in their own right, the distribution is to be made *per capita* and not *per stirpes*. Campbell v. Wiggins, 1 Rice's Ch. (S. C.) 10. And see Robinson v. Le Grand, 65 Ala. 111.

[2] Richards v. Miller, 62 Ill. 417.

[3] Acceptance of a devise, where it is beneficial to the devisee and attended with no charge or risk, is always presumed. Brown v. Thorndike, 15 Pick. 388.

[4] Gilbert v. Chapin, 19 Conn. 342; Bohn v. Barret's Ex'r, 11 Reporter, 839.

of deeds, the nature or quality of the estate conveyed, are usually "heirs," "heirs of the body," "issue," etc., and accordingly as the words are used may be either words of purchase or of limitation. The word "issue" presents the largest number of questions and has been productive of an almost innumerable number of decisions. As a word of limitation it is collective, and signifies all the descendants in all generations; but as a word of purchase it denotes the particular person or class of persons to take under the devise. The term may be employed in either manner, as will best effectuate the testator's intention, and is the most flexible word that can be used.[1] Courts more readily interpret the word "issue" as the synonym for "children," and as a mere description of the person or persons to take, than they do the words "heirs" or "heirs of the body."[2]

The usual and ordinary words for conveying a fee-simple, in wills as well as in deeds, are "heirs," or "heirs and assigns forever;" but a devise to a man "forever," or to one "and his assigns forever," or to one in "fee-simple," will pass an estate of inheritance to the devisee, notwithstanding the omission of the legal words of inheritance,[3] while the statute in a majority of the states will cover the deficiency and give to the devisee an estate in fee, none other being mentioned.[4]

[1] Timanus v. Dugan, 46 Md. 402; Daniel v. Whartenby, 17 Wall. 639. Words in the introductory or other parts of a will indicating an intention of the testator to dispose of his whole estate, although not conclusive that he intends to pass a fee, always favor such construction. Geyer v. Wentzel, 68 Pa. St. 84; Fearing v. Swift, 97 Mass. 413.

[2] In England the word "issue" is a word of limitation and not of purchase, unless the contrary clearly appears. 2 Jarm. on Wills, 328.

[3] Coke, Lit. 9 b; 2 Black. Com. 108; Meyers v. Anderson, 1 Strobh. Eq. (S. C.) 344; Timanus v. Dugan, 46 Md. 402; Tatum v. McClellan, 50 Miss. 1; Wetter v. Walker, 62 Ga. 142; Edwards v. Barnard, 84 Pa. St. 184.

[4] Leiter v. Sheppard, 85 Ill. 243; McConnell v. Smith, 23 Ill. 617; Mirfitt v. Jessopp, 94 Ill. 158. The statute very generally enacted throughout the Union provides, substantially, that every estate in lands, which shall be granted, conveyed or devised, although other words heretofore necessary to

Questions as to whether a devisee takes the fee or a lesser estate occur most frequently where the testator, in his anxiety to make his gift effective, makes several devises in the alternative, or limits one estate upon another. Such questions may frequently be decided by the application of the rule in Shelly's case, but no rule of general application can be formulated, and from a review of the reported cases on this subject one can well appreciate the remark of a learned writer, that "the liberality of the law in construing wills has opened the flood-gates of legal chaos."[1]

It would seem, however, that whenever the intention of the testator can be ascertained it will overcome all technical rules.[2]

The rule in Shelly's case.—The rule in Shelly's case is often invoked in the construction of devises to determine the operation of the will and settle conflicting claims. This rule, it will be remembered, provides that where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the term "heirs" is a word of limitation and not of purchase;[3] and when applied to wills it is ordinarily confined to cases in which the remainder is limited in terms to the "heirs"[4] and not to "children" or "issue."[5] When invoked, as a rule it is not a real

transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or does not appear to have been granted, conveyed or devised by construction or operation of law.

[1] O'Hara on Wills, 27. And see Clark v. Boorman's Exr's, 18 Wall. 493.

[2] Goodrich v. Lambert, 10 Conn. 448; Baker v. Scott, 62 Ill. 90; Butler v. Huestis, 68 Ill. 601. The decisions of the local courts will furnish the best guide for construing estates under wills, as, between the states, diametrically opposed views will frequently be met with on the same admitted facts.

[3] Baker v. Scott, 62 Ill. 90; Estate of Utz, 43 Cal. 200.

[4] A devise of an estate to a daughter, to be so secured to her that she shall enjoy it during her life, and after her decease to go to her heirs forever, will, under the rule in Shelly's case, give her an estate in fee-simple. Wicker v. Ray, 118 Ill. 472.

[5] Akers v. Akers, 23 N. J. Eq. 26; Estate of Utz, 43 Cal. 200. But

exception to the fundamental doctrine that the intention of the testator must guide in interpreting a will; it sacrifices a particular intent to a general intent. It does not interpret a will, but takes effect when the interpretation has been ascertained.[1]

Interpretation of particular words and phrases.— Though the testator is presumed to use technical words according to their technical meaning,[2] this can hardly be asserted as a rule; or, should it be so asserted, it must be taken subject to that other all-powerful rule that the intention of the testator must prevail.[3] The construction of words in a will is much less technical than that of the same words in a deed; for though in deeds effect will always be given to the true intention of the parties,[4] yet the words employed govern such intention, while in a will they are in all respects alike. Where the same precise form of expression occurs as may have been the subject of some former adjudication, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent; yet the cardinal canon still holds good, that the intention of the testator of each will separately is to be gathered from its own four corners,[5] and where the intention satisfactorily appears it should prevail over any artificial rule of construction.[6]

Words which pass real estate.— Sometimes wills contain no specific allusions to land, or particular bequests may be

see Haley v. Boston, 108 Mass. 576. The word "children" in its usual sense is a word of purchase and not of limitation, and is always to be so regarded unless the testator has unmistakably used it otherwise (Stump v. Jordan, 54 Md. 631; 2 Wash Real Prop. 4th ed. 603); while not infrequently the word "heirs," or even the words "heirs and assigns forever," are held not to operate as words of limitation because corrected or explained by words which follow and which are irreconcilable with the notion of descent. Shreve's Case, 43 Md. 399.

[1] Yarnall's Appeal, 70 Pa. St. 335.

[2] France's Estate, 75 Pa. St. 220.

[3] Smyth v. Taylor, 21 Ill. 296; Heuser v. Harris, 42 Ill. 425; Meade v. Jennings, 46 Mo. 91.

[4] Peckham v. Haddock, 36 Ill. 38; Churchill v. Reamer, 8 Bush. (Ky.), 256.

[5] Provenchere's Appeal, 67 Pa. St. 463.

[6] Kennedy v. Kennedy, 105 Ill. 350.

made in general terms, and in such cases grave questions of construction arise when real estate is claimed under them. The liberality of courts is nowhere more manifest than in the solution of these questions. The words "property" and "estate," when used in a general sense, are always held sufficient to embrace all the testator's property, real as well as personal;[1] but when coupled with directions applicable only to personalty they will not have this effect, nor where subsequent particulars clearly indicate that the testator had only personalty in contemplation.[2] The word "effects," though savoring strongly of personalty,[3] may, when the context clearly shows the intention, as when used in connection with the word "real,"[4] be sufficient to pass land.[5] "Goods," according to its natural grammatical and ordinary meaning, does not include lands. General usage has given it a meaning as consisting of personalty only, and this is its primary legal signification.[6] The context may sometimes enlarge this meaning; and where it satisfactorily appears that the testator intended to use the word in a different and more comprehensive sense, so as to embrace realty, courts will give effect to that intent. The phrase, "all my worldly goods," if used without specific enumeration, may reasonably be supposed to embrace lands, and in some instances has been so construed; but if attempt is made at designation, the restricted meaning implied from such designation will prevail.[7]

[1] Fogg v. Clark, 1 N. H. 163; Jackson v. Housel, 17 Johns. 281; Wheaton v. Andress, 23 Wend. 452; Hunt v. Hunt, 4 Gray (Mass.), 190; Korn v. Cutler, 26 Conn. 4; Monroe v. Jones, 8 R. I. 526. This is directly contrary to the earlier and more technical rule, which confined these words entirely to personalty unless there was something in the context to show that the testator intended a more enlarged meaning.

[2] Smith v. Hutchinson, 51 Mo. 83.

[3] Indeed, this term when used in a will is generally construed to refer to personalty only, unless there is something in the context to require a more extended application.

[4] As, "all my effects, real and personal."

[5] Paige v. Foust, 89 N. C. 447.

[6] Farish v. Cook, 78 Mo. 212.

[7] As where testator bequeaths "all my worldly goods, consisting of," etc., the enumeration describing only peasonalty, real estate not specifically mentioned or otherwise referred to will not pass.

The question will occur most frequently in constructions of the bequest of the residuum, and courts seem inclined to favor any construction which will avoid even a partial intestacy.[1]

Yet while no particular words are necessary to pass real estate, enough must appear to evidence the intention to convey, and words cannot be supplied to meet the deficiency, even though they may have been omitted by what might seem to be palpable error;[2] and where specific mention is made of certain property, other property not alluded to or covered by general terms will not pass.[3]

Limations of remainders.—Nine-tenths of all the litigation concerning testamentary conveyances is occasioned by questions relative to the construction of limitations of remainders. The subject has been incidentally discussed in several of the preceding paragraphs, and in addition to what has been there said little can be stated without entering into the matter at greater length than the exigencies of this work will permit. Local statutes are very effective in the settlement of such questions, so far as the validity of the remainder limited is concerned, as well as the persons who take, when particular words are accorded a statutory definition.

All words of purchase, as "children,"[4] "issue," etc., create remainders according to their import, while "heirs," when construed as a word of purchase, designates not only the persons who are to take, but also the manner and proportions in which they take.[5] The utmost liberality is dis-

[1] Vernon v. Vernon, 53 N. Y. 351; Cate v. Cranor, 30 Ind. 292; Damon v. Bibben, 135 Mass. 458.

[2] As where testator, after making certain bequests and devises, gave "all the rest of my estate — *personal*" to his four sons, and in a codicil stated that he had disposed of his "estate *real and* personal," to said sons, and revoked the share left to a certain son, *held*, that the court could not supply the words "real and" before "personal" in the will, and that testator died intestate as to his real estate, except a portion by another clause specifically devised. Graham v. Graham, 23 W. Va. 36.

[3] Farish v. Cook, 78 Mo. 212.

[4] Beacroft v. Strawn, 67 Ill. 28.

[5] Rand v. Sanger, 115 Mass. 124. The rules of descent, in such case, are presumed to be the intended guide.

played in the reported decisions construing remainders, and the circumstance that the first taker has it in his power to dispose of the whole estate, and thus defeat a limitation over, is not of itself conclusive that the expectant estate is void, when a contrary intention appears from the will.[1]

The intention of the testator must, in all cases, be carried out, when such intention can be ascertained from the will, and in no case can the intention thus ascertained be defeated by a technical construction of the language employed.[2]

Limitations to survivors have produced a vast amount of litigation, but the questions arising under such a devise may now be considered as well settled, and the general rule seems to be that the word "survivor" is to be taken in its natural and literal import, unless the contex plainly indicates a different intention, and should not be construed as equivalent to the word "other."[3] Where courts have given the word "survivor" the force of "other," it has been done to avoid some consequence which it was very certain the testator could not have intended.[4]

Devise to a class.—It is a rule of the common law that a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, but this rule has been greatly modified in nearly every state, so that when an estate is devised to the children or other relatives of the testator, the lineal descendants of a devisee who dies before the testator take the share of their ancestor.[5]

Gift of the income of realty.—It is a well-settled rule of law that a gift of the income of real estate, or of the "rents and profits" or "benefits," is a gift of the real estate itself. Those to whom the testator has given the income for life

[1] Terry v. Wiggins, 2 Lans, (N. Y.) 272; Burleigh v. Clough, 52 N. H. 267. Compare Clarke v. Tennison, 33 Md. 85.

[2] Terry v. Wiggins, 2 Lans. (N. Y.) 272.

[3] This is the construction which now obtains both in England and the United States. 2 Jarm. on Wills, 648; 2 Redf. on Wills, *372.

[4] Leeming v. Sherratt, 2 Hare (Eng.) 14; 2 Jarm. on Wills, 658. Consult Passmore's Appeal, 23 Pa. St. 381; Moore v. Lyons, 25 Wend. 119; Martin v. Kirby, 11 Gratt (Va.) 67.

[5] Jamieson v. Hay, 46 Mo. 546; Smiley v. Bailey, 59 Barb. 80.

will take a life estate, and those to whom he has given the perpetual income will take a fee-simple estate.[1] Such gift, however, to accomplish this purpose must be without qualification or restriction, and in order to determine whether there is such qualification or restriction recourse must be had to the whole will, with the view of ascertaining the sense in which the terms were used by the testator. When it appears from other parts of the will that the fee is otherwise disposed of, such terms cannot be held to carry the fee.[2]

Devise with power of disposition.—The student will recall that in a prior part of this work[3] we briefly discussed the general doctrine of powers in connection with the subject of estates. In the law of wills we find many applications of the doctrine and some of the practical phases are shown in this paragraph.

Where an estate is given to a person generally or indefinitely, with a power of disposition, it carries the fee, unless the testator gives to the first taker an estate for life only, and annexes a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee. This is the doctrine laid down by Kent[4] and the English writers,[5] and substantially followed by later American decisions.[6]

The question often arises where life estates are created by implication, as where the testator devises property generally, without a specification of the quantity of interest, and adds

[1] Reed v. Reed, 9 Mass. 372; Butterfield v. Haskins, 33 Me. 392; Earl v. Row, 35 Me. 414; Collier v. Grimsey, 36 Ohio St. 17; Drusadow v. Wilde, 63 Pa. St. 170; Morgan v. Pope, 7 Coldw. (Tenn.) 541.

[2] Collier v. Grimsey, 36 Ohio St. 17; Morgan v. Pope, 7 Coldw. (Tenn.) 541.

[3] See p. 125 *ante*.

[4] 4 Kent Com. *535.

[5] Cruise, Dig., tit. 38, ch. 13 § 5; Jarm. on Wills (Bigelow) *873.

[6] Ramsdell v. Ramsdell, 21 Me. 288; Jones v. Bacon, 68 Me. 34; Smith v. Bell, 6 Pet. 68; Gifford v. Choate, 100 Mass. 346; Burleigh v. Clough, 52 N. H. 267; Jackson v. Robbins, 16 Johns, 537; Ayer v. Ayer, 128 Mass. 575; Downey v. Borden, 36 N. J. L. 460; Benker v. Jacoby, 36 Iowa, 273; Hamlin v. Express Co., 107 Ill. 443.

some power of disposition with a remainder or limitation over. In such case, where an absolute power of disposition is annexed to the gift, a limitation over is of no effect;[1] but where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, the words last used restrict and limit the words first used, and reduce what was apparently an estate in fee to an estate for life only.[2] Where there is a devise for life, in express terms, a power of disposal annexed cannot enlarge it to a fee;[3] nor is it opposed to any rule of law to create a life estate with a power to sell and convey, and limit a remainder after its termination.[4]

A conveyance by a devisee for life, but with an absolute power of disposal of the reversion, will vest in the grantee of such devisee an estate in fee,[5] while in case the power has not been exercised, the land, on the death of such devisee, reverts to the heirs of the devisor.[6] An important distinction will, however, be observed between an absolute and unconditional power of disposal in the discretion of the devisee and a power restricting the disposition both as to time and manner. The devise of an estate for life, with authority in the devisee to dispose of same by last will and testament, does not convey absolute ownership;[7] nor would the further

[1] Rand v. Meir, 47 Iowa, 607; Seigwald v. Seigwald, 37 Ill. 430; Roseboom v. Roseboom, 81 N. Y. 356.

[2] Stuart v. Walker, 11 Reporter, 533; Merrill v. Emery, 10 Pick. 512; Jarm. on Wills (Bigelow) *879. A devise with power of disposition, although providing for an ultimate remainder of what remains undisposed of at the death of the first taker, will vest a fee, or a right to convey in fee. Lyon v. Marsh, 116 Mass. 232.

[3] Hamlin v. Express Co., 107 Ill. 443.

[4] Ward v. Amory, 4 Curtis, 425; Jarm. on Wills (Bigelow) *873; Welsch v. Savings Bank, 94 Ill. 191; Jassey v. White, 28 Ga. 295; Downey v. Borden, 36 N. J. L. 460. A different rule prevails in some states. See Hazel v. Hagan, 47 Mo. 277.

[5] Funk v. Eggleston, 92 Ill. 515; Hazel v. Hagan, 47 Mo. 277; Levy v. Griffiths, 65 N. C. 236; Lyon v. Marsh, 116 Mass. 232.

[6] Fairman v. Beal, 14 Ill. 244.

[7] Bryant v. Christian, 58 Mo. 98. And see Terry v. Wiggins, 2 Lans. (N. Y.) 272. This is a power of appointment. See remarks under that head p. 126, *ante*.

fact that the will devising same charged the payment of the debts on the devisee be sufficient to enlarge the life estate to a fee-simple.[1] The right of testamentary disposition is a mere power; and though the authorities are not altogether harmonious as to the right of the devisee to exercise such power by deed, it would yet seem that a warranty deed in fee-simple, executed by the devisee, which made no reference to the will by which the power of disposition was given, and contained no evidence of an intention to execute the power, would convey only the life estate of the devisee.[2] The question seems to turn upon the fact of intention in the donee of the power to execute it; and when there are co-existing interests, one within and the other without the power, it would seem that the intention to execute the power, whether by deed or will, must be apparent and clear; but that intention, however manifested, whether directly or indirectly, positively or by just implication, will, when established, render a conveyance by the devisee valid and operative.[3]

[1] Dunning v. VanDusen, 47 Ind. 423; Jassey v. White, 28 Ga. 295; Jarm. on Wills (Bigelow) *873.

[2] Dunning v. Van Dusen, 47 Ind. 423; Funk v. Eggleston, 92 Ill. 515. It may be laid down as a general rule, that in all cases where by the terms of the will there has been an express limitation of an estate to the first taker, for life, and a limitation over any general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, must be regarded as referring to the life interest only, and therefore as limited by such interest. Welsch v. Belleville Savings Bank, 94 Ill. 191.

[3] Funk v. Eggleston, 92 Ill. 515. In this case the subject of a devise for life with power of disposition is very exhaustively treated in a learned and able opinion by Baker, J. The fundamental principle deducible from the English decisions is that there should be a certain ascertainment of the intention of the donee of the power to act under the power. Three classes of cases arose in which it was demonstrated to an absolute moral certainty there was an intention to execute the power, and these were: (1) when there was a reference to the power; or (2) to the subject or property covered by the power; or (3) when the instrument would be inoperative without the aid of the power. The cases ranging themselves in one or the other of these three classes, it was judicially announced in some

Indeterminate devise.—Owing to the liberal construction accorded to wills as well as sweeping statutory enactments relative to the limitation of estates, fewer questions will now arise in regard to the quantity or duration of estates than formally. Wills drawn by the testator, or *holographic* wills, frequently fail to express clearly such testator's intentions, and as they are usually copied from the ever-ready "form book" and adapted to his wants, they not infrequently fail to expressly define the nature or extent of the estate he seeks to convey.

A devise indeterminate in its terms and without words of limitation, which, standing alone and unaided by statute, would create only an estate for life, will be enlarged to a fee by the imposition of a charge upon the person of the devisee, or on the *quantum* of the interest devised to him;[1] but not if the premises are merely devised subject to a

of the cases that there could be no execution of a power unless the case fell in one or the other of these three classes. See Sir Edward Clere's Case, 6 Coke, 17; Standen v. Standen, 2 Ves. Jr. 589. But in furtherance of the general rule that the intention of the testator (in case of disposition by will) is the pole-star to guide in the interpretation, the English rule, which requires the existence of one of the three elements above enumerated, is made altogether subordinate and secondary in its character, and if circumstances arise that indicate clearly the intention of the donee to work by the power, the artificial rule predicated upon former experience, must give way, and the primary and fundamental rule, which requires only that the intention must be clear and manifest, will prevail. "The main point," says Mr. Justice Story (Blagge v. Miles, 1 Story, 427), "is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, will make the execution valid and operative." But the intention must be clear and apparent so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then the doubt will prevent it from being deemed an execution of the power. Blagge v. Miles, 1 Story, 427; Dunning v. Van Dusen, 47 Ind. 423.

[1] Tracy v. Kilbourn, 3 Cush. (Mass.) 557; Baker v. Bridge, 12 Pick. 27; Barheydt v. Barheydt, 20 Wend. 576.

charge.[1] Where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only;[2] but where the charge is on the person of the devisee in respect of the estate in his hands, he takes a fee by implication.[3] If the charge be on the person of the devisee, the amount is unimportant, if the sum is to be paid absolutely.[4] But this, it will be understood, applies only to indefinite devises. Where the estate is given for life in express terms, and some other determinate estate is expressly given or arises by necessary implication from the language of the devise over, the rule is inoperative to enlarge such an estate to a fee.[5]

Devise on condition precedent.—This frequently occurs where land is given on condition that the devisee pay certain legacies, or perform certain acts, etc., and performance of the conditions is essential to the vesting of the estate.[6] Where the conditions are limited as to time, and are not performed within that time, the devise does not take effect,[7] but becomes inoperative and void.

Conditional devise—Marriage.—Estates for life are frequently devised to surviving husbands or wives, subject to a defeasance in the event of a second marriage. Conditions in general restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy and therefore void. But this rule has never been considered as extending to special restraints, such as against

[1] Hawkins on Wills, 134.

[2] Fox v. Phelps, 17 Wend. 393. By force of the statute a general devise will pass all the testator's estate, including the fee, unless a contrary intent fairly appears.

[3] Jackson v. Bull, 10 Johns. 148; Funk v. Eggleston, 92 Ill. 515; Merritt v. Brantley, 8 Fla. 226; Cook v. Holmes, 11 Mass. 528; Wait v. Belding, 24 Pick. 129.

[4] Collier's Case, 6 Rep. 16; 2 Jarm. on Wills, 171; Jackson v. Merrill, 6 Johns. 186; Barheydt v. Barheydt, 20 Wend. 576; Jackson v. Harris, 12 Wend. 83.

[5] 2 Jarm. on Wills, 173; Groves v. Cox, 40 N. J. L. 40.

[6] Nevius v. Gourley, 95 Ill. 206. A court of chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law. Id.

[7] Nevius v. Gourley, 97 Ill. 356 (second hearing); Den v. Messenger, 33 N. J. L. 490.

marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good on breach of the condition. A condition, therefore, that a widow shall not marry, is by all the authorities held not to be unlawful.[1] A distinction is also made between those cases where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent, and the decisions have generally been made to turn upon the question whether there be a gift or devise over or not. But if the devise be to a person until he or she shall marry, and upon such marriage then over, this is a good limitation as distinguished from condition;[2] as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation ceasing or commencing, and this whether the devisee be man or woman, or other than husband and wife.[3]

Continued — Contingent remainders. — Under devises similar to those mentioned in the preceeding paragraph, the devise over, according to the phraseology used, will be either a vested or contingent remainder. The essence of a contingent remainder is, that it is limited to take effect on an event or condition that may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate.[4] Thus, where a devise over operates, at the death or marriage of the first devisee, to such of testator's children as shall then be living, this would give a contingent remainder to such of the children as were living when such contingency of death or

[1] Bostick v. Blades, 15 Reporter, 399; 2 Powell on Devises, 283; Clark v. Tennison, 33 Md. 85.

[2] Technically this would be a conditional limitation, see p. 115, *ante*.

[3] Bostick v. Blades, 15 Reporter, 399; Arthur v. Cole, 56 Md. 100; Brown v. Brown, 41 N. Y. 507.

[4] Bouv. Law Dict. 435, and see p. 93, *ante*.

marriage happened. The children of such testator who may have died after the testator and prior to the happening of the contingency would take no estate, nor would their heirs; [1] and the fact that the words "to them, their heirs," etc., followed the mention of the children would not affect the result stated, for such words do not describe the devises but the quantity of their estate, and merely show the estate taken by the previous words to be a fee.[2]

Possible reversion.— A possibility of reversion may be created either by deed or will, but more frequently occurs under the latter. It is a possibility of reinvesture in the grantor or his heirs, and occurs where a conveyance is made to one for life or years with a contingent remainder. Thus, in case of a devise to an unmarried woman, and to the "heirs of her body" or "children;" here the devisee named would take a life estate only, while a contingent remainder is created in favor of her heirs, who, when born, would take the fee. The will in such case effectually divests the heirs of the testator of all estate but creates a possibility of reversion, dependent upon the devisee's dying without issue.[3]

Devises to executors in trust.— It is a rule in equity that the language employed in devises must be such as to show that the object is certain and well defined, and that the beneficiaries be either named, or capable of easy ascertainment within the rules of law which are applicable to such cases; and further, that the trusts be of such a nature that the court can direct their execution; failing in this the property will fall into the residue of the estate.[4]

[1] Olney v. Hall, 21 Pick. 311; Emmison v. Whitelsey, 55 Mo. 254.

[2] Thompson v. Ludington, 104 Mass. 193.

[3] Frazer v. Supervisors Peoria Co., 74 Ill. 282; 2 Bl. Com. 164; Blair v. Vanblarcum, 71 Ill. 290. This reversionary interest may itself be the subject of devise (Austin v. Cambridgeport, 21 Pick. 215), and will pass under a residuary clause (Steel v. Cook, 1 Met. 281); and the right to same may by asserted by the heirs of such residuary devisee after his death. Clapp v. Stoughton, 10 Pick. 462.

[4] Holmes v. Mead, 52 N. Y. 332; Powell on Devises, 418; Darling v. Rogers, 22 Wend. 494; 2 Story, Eq. Jur., § 979; Wheeler v. Smith, 9 How. (U. S.) 55.

Devises in trust are frequently made to executors, the object being usually to promote some educational, charitable or religious purpose, the beneficiary being an institution devoted to the furtherance of those objects, though it is not uncommon to make beneficial devises to individuals in the same manner. It is usual, though not necessary, to specifically name or describe the intended beneficiaries, and numerous authorities sustain devises to executors or trustees which confer upon them authority to divide the same among such persons as they may select from certain classes which are designated, and among such children or relatives, who are intended to be provided for, whom they may deem proper.[1] Where, however, a devise is too indefinite to give certainty it will be void. Thus, a devise in trust for such object of benevolence and liberality as the trustee in his discretion shall approve, would have this effect.[2] So, also, would a power of appointment to one to give or devise property "among such benevolent, religious or charitable institutions as he may think proper"[3] be vague and indefinite. A power of disposition to such members of a specified branch of a family as the trustee might consider most deserving is void for the same reason.[4] A direction to give a fund in "private charity" is too indefinite,[5] or to give what they might choose;[6] but when the beneficiaries are capable of identification, although not named, the trust will be valid; and a testator may commit to competent persons the power to designate who of certain persons shall participate in a specified portion of his estate, and in what proportions the property shall be divided.[7]

[1] Power v. Cassidy, 79 N. Y. 602; Bull v. Bull, 8 Conn. 48; Norris v. Thompson's Ex'rs, 19 N. J. Eq. 307; McLoughlin v. McLoughlin, 30 Barb. 458.

[2] Morice v. Bishop of Durham, 10 Ves. (Eng.) 522.

[3] Norris v. Thompson's Ex'rs, 19 N. J. Eq. 307.

[4] Stubbs v. Sargon, 3 Myl. & Cr. (Eng. Ch.) 507.

[5] Ommanny v. Butcher, 1 T. & R. (Eng. Ch.) 260.

[6] Wetmore v. Parker, 52 N. Y. 450.

[7] Williams v. Williams, 4 Seld. 548; Owens v. Miss. Soc., 14 N. Y. 386; 2 Redf. on Wills, 779; White v. Fisk, 22 Conn. 31; Lefevre v. Lefevre, 59 N. Y. 434.

Bequest to devisee by description.—The observations of the last section are in a measure applicable to direct bequests, for a devisee, whether a corporation or a natural person, may be designated by description as well as by name.[1] It is only necessary that the description of the devisee be by words that are sufficient to denote the person meant by the testator, and to distinguish him from all other persons.[2] In such cases, however, a judicial construction is necessary in order to fully perfect the title of the imperfectly designated devisee, and the decree rendered upon such construction, together with the will, forms the basis of the devisee's claim of title. Devises to corporations are particularly subject to the rule above stated, as the testator frequently fails to insert the strictly legal name of the corporation through inadvertence, ignorance or mistake. Parol evidence is always admissible to remove latent ambiguities; and where there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator.[3]

Precatory Trusts.—What are known as *precatory trusts* grow out of words of entreaty, wish, expectation, request or recommendation frequently employed in wills, and the authorities, both English and American, are conclusive, and in the main harmonious, that a trust will be created by such words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions, to be acted on or not according to the caprice of the immediate devisee, or negatived by other expressions indicating a contrary intention, and the subject and object be sufficiently certain.[4] An absolute gift to one person, ac-

[1] Lefevre v. Lefevre, 59 N. Y. 434.

[2] Button v. Am. Tract Soc'y, 23 Vt. 336; McAllister v. McAllister, 46 Vt. 272; Minot v. Curtis, 7 Mass. 441; Holmes v. Mead, 52 N. Y. 332; Gardner v. Heyer, 2 Paige, 11.

[3] Lefevre v. Lefevre, 59 N. Y. 434; St. Luke's Home v. Ass'n for Indigent Females, 52 N. Y. 191.

[4] Bohon v. Barrett's Ex'r, 79 Ky. 378; Hill on Trustees, 92; Perry on Trusts, 4; Gilbert v. Chapin, 19 Conn. 342.

companied with a request to appropriate a particular sum to another person, creates in the immediate devisee a trusteeship to the extent of such sum; nor does the absolute gift contravene either an express or implied trust annexed to the gift, as it is a common thing to invest the legal title and trusteeship in the same person, who is to receive the benefit in the event of the failure of the trust. It is equally well settled, however, that a mere direction by a testator that a devisee shall pay a legacy does not thereby create a charge on the land, and, to accomplish this, there must be express words or necessary implication from the whole will that such was the intention.[1]

There has been a tendency manifested by some courts to restrict the application of this rule or to qualify it, and, in some instances, to reject it altogether, and to adopt, as more reasonable, the presumption that words precatory in form are meant to imply a discretion in the donee, and should be so construed unless clearly shown to be used in an imperative sense from other parts of the will;[2] but the weight of authority sustains the principles first stated, and precatory words are generally held to be creative of trusts, when the contrary does not appear from the context or by necessary implication.[3]

Perpetuities.— Attempts are frequently made in wills (though seldom in deeds) to create what the law regards as *perpetuities*, and this occurs whenever there is a suspension of the power of alienation for a longer period than a life or lives in being at the creation of the estate,[4] or of such lives in being and twenty-one years and nine months at the farthest,[5] the rule varying somewhat in different states. In construing dispositions of property with reference to the statute against perpetuities, the rule is settled that any limi-

[1] Cable's Appeal, 9 Reporter, 57; Lupton v. Lupton, 2 Johns. Ch. 614; Chapin v. Gilbert, 19 Conn. 342; Pennock's Estate, 20 Pa. St. 268; Walter's Appeal, 95 Pa. St. 305; Taylor v. Dodd, 58 N. Y. 335; Read v. Cather, 18 W. Va. 263.

[2] Pennock's Case, 20 Pa. St. 272.

[3] Reed's Adm'r v. Reed, 30 Ind. 313; Warner v. Bates, 98 Mass. 274.

[4] Schettler v. Smith, 41 N. Y. 328; Knox v. Jones, 47 N. Y. 389.

[5] Stephens v. Evans, 30 Ind. 39. See 1 Jarm. on Wills, 226.

tation is void as in violation of that statute by which the suspension of the power of alienation will not necessarily, under all possible circumstances, terminate within the prescribed period. It is not enough that it *may* terminate; it *must*, and if by any possibility the vesting of the estate may be postponed beyond the statutory period, the limitation will be void.[1] In all cases where the limitation is void as being too remote, the will should be construed as if no such clause were in it, and the first taker will hold his estate discharged from the limitation over.[2]

Lapsed devise.— When a devisee named in a will dies during the life-time of the testator, the devise is said to *lapse*, that is it does not go to the heirs of such deceased devisee, but fall back into the estate of the testator. The rule though frequently acknowledged to be productive of great hardship, and to be often contrary to the intention of the testator, is too firmly established to be questioned. It is regarded as a rule of necessity, and merely amounts to this: That if there be no devisee, there is in effect no devise.[3] Statutes have changed or modified this rule in some of the states but there is no uniformity in such statutes or in the judicial constructions which have been accorded them.

Devises for the payment of debts.— Land devised to trustees for the payment of debts and legacies is usually regarded in equity as money,[4] under what is known as the doctrine of *equitable conversion*, but the heir at law has a resulting trust in such land after the debts and legacies are paid, and may restrain the trustee from selling more than is necessary to pay such debts and legacies; or may pay them himself and have conveyance of that portion of the land not sold in the first case, and of the whole in the latter, which

[1] Schettler v. Smith, 41 N. Y. 328; Stephens v. Evans, 30 Ind. 39; Lorrillard v. Coster, 5 Paige, 172; Hawley v. Northampton, 8 Mass. 3.

[2] Wood v. Griffin, 46 N. H. 234; Anderson v. Grable, 1 Ark. 136.

[3] Davis' Heirs v. Taul, 6 Dana, 52.

[4] Craig v. Leslie, 3 Wheat. 463 Story, Eq., § 552; Dill v. Wisner, 88 N. Y. 153.

property will, in either case, be land and not money.[1] Equity will extend the same privilege to the residuary devisee.[2] A mere charge upon lands stands upon a different footing, and the executor possesses no power to sell or dispose of the land in such case except by license or direction of the probate court.[3] The land in the hands of the devisee is burdened by the charge,[4] and should he renounce the devise such land will descend to the heir at law subject to the charge;[5] but the executor, having no *status* as a trustee, takes no interest in same, and no power can be implied from the mere charge of the debts and legacies upon the lands devised.[6]

Charges on lands devised.—Real estate is not as of course charged with the payment of legacies. It is never so charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred from the language and dispositions of the will.[7] Mere directions to pay debts and legacies are not sufficient to create a charge;[8] but where the testator devises his real estate *after* payment of debts and legacies, or with a direction that debts and legacies be *first* paid, then the real estate is charged with the payment of them and they become a lien upon the land.[9] If the devisee accepts the devise, he becomes personally liable for the legacies,[10] which still remain, however, a charge upon the land.[11] When the same sentence

[1] Craig v. Leslie, 3 Wheat. 463.

[2] Craig v. Leslie, 3 Wheat. 463.

[3] Dill v. Wisner, 88 N. Y. 153.

[4] Gridley v. Gridley, 24 N. Y. 130; Harris v. Fly, 7 Paige, 421.

[5] Birdsall v. Hewlett, 1 Paige, 32.

[6] In re Fox, 52 N. Y. 530.

[7] Okeson's Appeal, 59 Pa. St. 99; Kirkpatrick v. Chestnut, 5 S. C. 216; Lupton v. Lupton, 2 Johns. Ch. 614; Cables Appeal, 9 Reporter, 57. Legacies are primarily payable out of the personal estate.

[8] Taylor v. Dodd, 58 N. Y. 335; Walter's Appeal, 95 Pa. St. 305.

[9] Lupton v. Lupton, 2 Johns. Ch. 614; Wood v. Sampson, 25 Gratt. (Va.) 845.

[10] Birdsall v. Hewlett, 1 Paige, 33; Burch v. Burch, 52 Ind. 136.

[11] "It seems to be well settled," says Mr. Redfield, "that where lands are held by subsequent *bona fide* purchasers for value, but who are obliged to trace title through a devise, whereby a charge is created upon the land for the payment of legacies, such purchasers will be constructively affected with notice

or clause by which land is devised imposes on the devisee the duty of paying an annuity, and no other fund is provided out of which the payment is to be made, the annuity is a charge upon the land;[1] and in like manner, where a testator, without creating an express trust to pay legacies, makes a general residuary disposition of his whole estate, blending the realty and personalty together in one fund, the real estate is constructively charged with the legacies.[2] In every instance, therefore, where legacies are directly or constructively charges or liens upon the realty, satisfactory assurance must be given that the legacies have been paid or the lien released before the title is accepted by a purchaser from the devisee.

In this connection an important distinction should be noted, with respect to the estate possessed by the devisee, between such legacies as constitute a personal charge upon the devisee, and such as are expressly charged upon the estate. Where an estate is devised subject to the payment of legacies, if the legacies are made a personal charge upon the devisee, an acceptance of the devise operates to make such legacies a personal liability of the devisee, and he will take the estate devised as a purchaser for value; but if the legacies are charged upon the estate devised, the devisee does not take as a purchaser,[3] but as a beneficial devisee.[4]

Equitable conversion.— It is a fundamental principle in equity, long established and universally recognized, that where the testator directs that his real property be converted into money on or before a given time, it becomes, at law, money, and will be treated as personalty from the moment of his death. In such case, therefore, the heir takes no in-

of such charge, and equity will enforce it upon the land in their hands." 2 Redf. on Wills, *210, citing Harris v. Fly, 7 Paige, 421; Wallington v. Taylor, Saxton, 314. And see Aston v. Galloway, 3 Ired. Eq. (N. C.) 126.

[1] Merrill v. Bickford, 65 Me. 118.

[2] Lewis v. Darling, 16 How. 1; Nichols v. Postlethwaite, 2 Dall. 131; Hill on Trustees, 860; Gallagher's Appeal, 48 Pa. St. 121.

[3] The term "purchaser" is here used in its restricted sense arising out of the relation of vendor and vendee, or seller and buyer.

[4] Funk v. Eggleston, 92 Ill. 515.

terest in the land, which is held by the executor as other personal property, and can make no conveyance of same that will defeat or impair the rights of a purchaser from the executor. Yet, to effect this change the intention of the testator must appear by unequivocal declaration. There must be an imperative and unmistakable direction to sell; and if the power to sell, or the sale itself is coupled with terms or dependent upon a contingency, there is no conversion until the terms have been complied with or the contingency has happened; and, as courts are always averse to sanctioning a change in the quality of an estate, if there be any doubt as to the intention of the testator the original character of the property will be retained.[1]

Executory Devise.—In a former part of the work[2] special attention was directed to that form of an expectant estate known as a remainder, and it will be remembered that this is an estate, to take effect in possession on the termination of a preceding particular estate. It will further be remembered that remainders are either vested or contingent but in either event they take effect *immediately* upon the determination of the preceding estate. Expectant estates may be created as well by will as by deed but not infrequently testators attempt to limit future interests in a manner not sanctioned by the rules of law which apply to ordinary conveyances by deed, and courts, as an indulgence to a man's last will, have frequently permitted such limitations to have an effect when a denial would result in intestacy. This class of limitations is known as *executory devises.*

If a particular estate, say an estate for life, is followed by a limitation which is not immediately connected with or does not commence upon the expiration of such particular estate, then under the ordinary rules of conveyancing such limitation is incapable of effect as a remainder but in case of wills it may operate as an executory devise, if confined within the requisite periods of time provided by the rules respect-

[1] Orrick v. Boehm, 49 Md. 104; Peter v. Beverly, 10 Pet. (U. S.) 533.

[2] See p. 93 *ante.*

ing perpetuities. As, if land be devised to A for life, and after his decease to B in fee, here the limitation to B is connected with and commences on the expiration of the precedent life estate. This would be a remainder. But if the limitation was to A for life, and one year after his decease to B in fee, it will be perceived that there is no immediate connection between the two estates and that, under the rule, the estate limited to B cannot take effect in remainder. Now it will frequently happen that gaps of this nature will occur when devises are made to depend on contingencies, as where a devise is limited to A for life, and after his decease to B but with a proviso, that if B shall survive A and afterwards die leaving no issue of his body living at the time of his decease, then the title is to devolve on C. It will be seen in the foregoing illustration that the limitation to B prevents any immediate connection of the estate limited to C with the precedent particular estate limited to A and prevents its commencement on the expiration of A's life estate, therefore the limitation to C cannot operate as a remainder but may take effect as an executory devise.[1]

3. *Proof of Wills.*

Generally.—Before a will is permitted to have a legal operation as a conveyance it must, in some manner, be established as the act and deed of the testator. Formerly much laxity prevailed with respect to the proof of wills. No special means of legal authentication were provided; and though it became a common practice, where title depended upon a devise, to prove the execution of the will in chancery, yet this was not considered necessary to perfect title any more than it would be to prove the execution of a deed.[2] For many years, however, courts have been provided with special jurisdiction in the matter of the proof of wills and administration of decedents' estates, and to such courts must be referred all testamentary writings, such reference being technically known as a *probate.*

[1] See Wharton s Conv. 117; Fearne, Cont. Rem. 386.

[2] Cruise, Dig., tit. 38 ch. V.

Probate of Wills.—Probate of a will may be defined as the proof, before a tribunal authorized by law, that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.[1] It is the authentication of the instrument, and that which gives to it its legal effect and validity as a conveyance.[2] A will, therefore, which has not been admitted to probate, though admissible, perhaps, in connection with proof of adverse possession, is not evidence of title in a court of law,[3] nor would it afford constructive notice if recorded.

Effect of Probate.—The probate of a will, if decreed by a court of competent jurisdiction, establishes the facts; (1) that the testator at the time of executing the instrument was of sound and disposing mind and memory, capable of understanding the act he was doing, and the relation in which he stood to the object of his bounty, and to the persons to whom the law would have given his property if he had died intestate; (2) that the instrument was executed without fear, fraud or undue influence by which his own intentions were controlled and supplanted by those of another; (3) that he executed the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament;[4] and (4) it is presumptive evidence of the death of the person whose will it purports to establish.[5] Such decree is generally regarded as in the nature of a judgment *in rem*,[6] and in the absence of statutory provisions is conclusive as against all the world as to the validity of the will,[7] and affirms the

[1] 2 Bouv. Law Dict. 378; Pettit v. Black, 15 Reporter, 90.

[2] Armstrong v. Lear, 12 Wheat. 175.

[3] Willamette, etc. Co. v. Gordon, 6 Oreg. 175; Wood v. Mathews, 53 Ala. 1; Pitts v. Melser, 72 Ind. 469; Shumway v. Holbrook, 1 Pick. 114; Ochoa v. Miller, 59 Tex. 460; Pettit v. Black, 13 Neb. 142.

[4] Barker v. Comins, 110 Mass. 477.

[5] Carroll v. Carroll, 6 Thomp. & C. (N. Y.) 294; Belden v. Meeker, 47 N. Y. 307.

[6] Hall v. Hall, 47 Ala. 290; Crippen v. Dexter, 13 Gray (Mass.), 330; State v. McGlynn, 20 Cal. 233.

[7] Brock v. Frank, 5 Ala. 85; Janes v. Williams, 31 Ark. 175; Tucker v. Whitehead, 58 Miss. 762; In re Williams, 1 Lea (Tenn.), 529; Orr v. O'Brien, 55 Tex. 149.

title of the beneficiary under it from the time of the testators' death, relating back so as to make valid whatever had been previously done, which, under the will, after probate, the beneficiary could lawfully have done.[1]

But though probate establishes the sufficiency of the will, and confirms the claims of those holding under it, so far as to make it evidence of title, it does not determine the title to the property, nor establish the validity of any devise given by it, the will having no greater effect after probate than any other legal conveyance.[2]

Foreign Probate — In order to entitle a devisee of lands under a will probated in a foreign jurisdiction to deduce legal title to same in the courts of the state where the land is located, it is necessary that the will be also probated in the local courts. This matter is governed by statute, which generally provides that the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, these together constituting the one instrument or subject-matter to be acted upon under the statute; and all are, as a rule, essential to authorize the probate court to exercise jurisdiction.[3] Whenever this ancillary probate is resorted to it is generally allowed as a matter of course and without inquiring into the validity of the will or the sufficiency of proofs upon which the court granting the original probate acted, provided such original probate was granted by a court of competent jurisdiction and is properly authenticated.[4]

[1] Stuphen v. Ellis, 35 Mich. 446; Allaire v. Allaire, 37 N. J. L. 312; Dublin v. Chadbourn, 16 Mass. 433.

[2] Fallon v. Chidester, 46 Iowa 588; Greenwood v. Murray, 26 Minn. 259; Ware v. Wisner, 4 McCrary (C. Ct.), 66.

[3] Pope v. Cutler, 34 Mich. 150; Ward v. Oates, 43 Ala. 515.

[4] Brock v. Frank, 51 Ala. 89; Apperson v. Bolton, 29 Ark. 418; Newman v. Willetts, 52 Ill. 98; Russell v. Hart, 87 N. Y. 19; Markwell v. Thorne, 28 Wis. 548.

CHAPTER IX.

CONCLUSION.

General review of the topics discussed in the book — Analytical and Synoptical charts of the principal heads of the law of Real Property — Suggestions with respect to secondary reading and finis.

General resume.— As a result of our study of this little book we find; that the subject of real property, as that term is now understood in the law, is comprised under three general heads; (1) the subject-matter, or the *thing*, in, over, or concerning which, ownership or proprietary right, is exercised; (2) the *right*, or specific degree of interest that may be had in the *thing;* (3) the *authority* by which the *right* is exercised in, over, or concerning the *thing*. But while these terms truly represent the fundamental ideas involved yet in their practical expression we employ a different language; the first we call the *land*, the second the *estate*, and the third the *title*.

Specializing from these three general divisions we find; that the land, or, to use a more technical but equivalent expression, the *hereditament*, may consist of a substantial object, or it may be a mere legal abstraction, in other words it may be *corporeal* or *incorporeal*, but in either case it is still a *thing*— an object of measurable value, and hence a subject of proprietary right and therefore of legal cognizance. We further find that aggregations of material objects, as well as the aggregate of rights, may, for purposes of juristic convenience, be treated as a thing; that land includes both its natural increment and its artificial annexations; that an easement, or other form of incorporeal property consists of a collection of rights.

Now with respect to the specific degree of interest that may be had in the hereditament — in other words, the *estate*, we have seen that under the peculiar operation of our laws there

may be a duality; that one person may be possessed of same in the cognizance of a court of law and that another may be vested with it in the contemplation of a court of equity — hence there may be, as it were, a double ownership of the same property, depending on the point of view. So we say the estate may be *legal* or *equitable*, but the incidents are the same in either case, and, notwithstanding the apparent duality, there is, in fact, but one estate.

Again, the authority by which an estate is enjoyed may be paramount in character, the simple assertion of proprietary right being sufficient to preclude all question and to dispense with antecedent inquiry; or, the right may depend upon the regularity and legality of the method of acquisition, which imposes a duty of antecedent inquiry on the part of a purchaser, and so we have a primary division of title into *original* and *derivative*.

These primary divisions deal with the principles which underlie the entire law of real property and upon them all subsequent specializations are made. If the student has carefully studied and understood the purpose and effect of these divisions he is prepared to enter upon the more difficult and abstruse problems which this branch of the law presents. If he does not fully understand them, then it were better that he retrace his steps, nor again attempt to proceed forward until fully conscious of having mastered them. As has been well said by a learned writer,[1] "so great is the technical complication and difficulty of the subject that within the special studies of the legal profession the study of this is a specialty of itself, and even among accomplished lawyers the number of those who are well versed in real property law is but small." Unless the basic principles are thoroughly understood satisfactory progress is impossible.

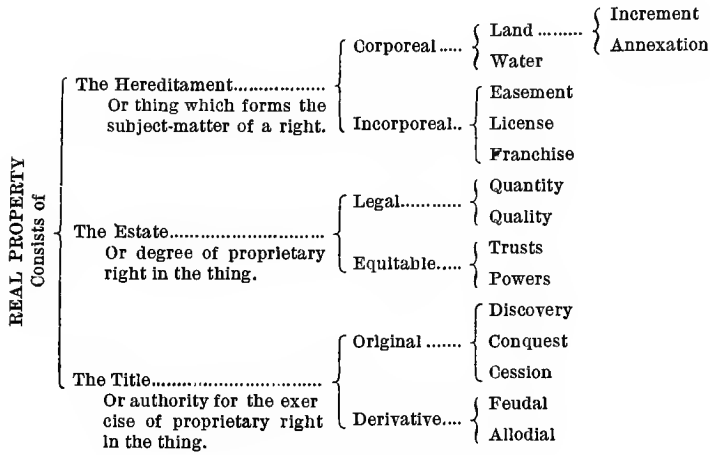
In the study of any subject capable of orderly analysis or division the mind is greatly aided by an arrangement that appeals to the eye. The author has endeavored to supply some of these aids by preparing a few synoptical charts. The

[1] Pollock Land Laws, 5.

divisions we have just considered are set forth in the following:

A CHART

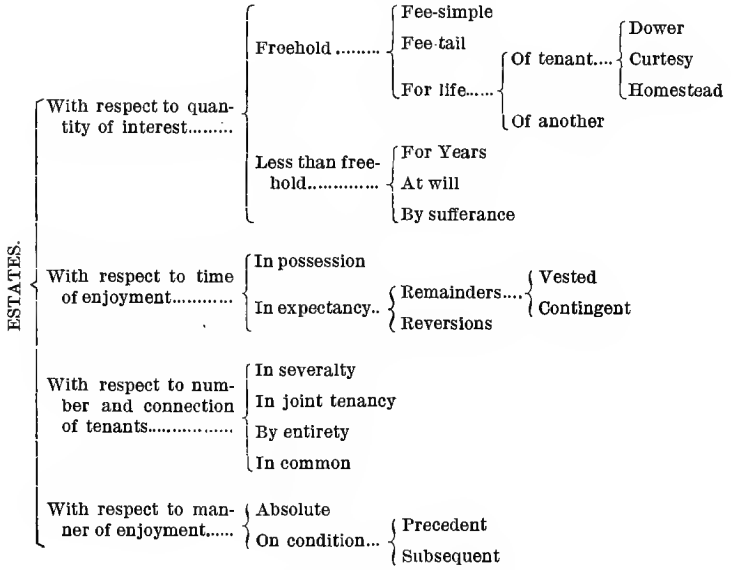
SHOWING THE PRIMARY DIVISIONS OF THE LAW OF REAL PROPERTY.



We have seen that incidental to the estate there are two important factors which determine its character, viz. *quantity* and *quality*. From these two circumstances we obtain the primary divisions of estates with respect to their duration, time, number and connection of tenants and manner of enjoyment. Again we may appeal to the eye to aid mental effort in classifying and arranging the rights of property which are included in the legal concept of an *estate*, and the following chart will serve as a synoptical review of the matters discussed in chapter III. If the import of each division, together with the relation which it sustains to those in immediate connection, is not understood, the chapter should be again gone over with the chart as a guide.

A CHART

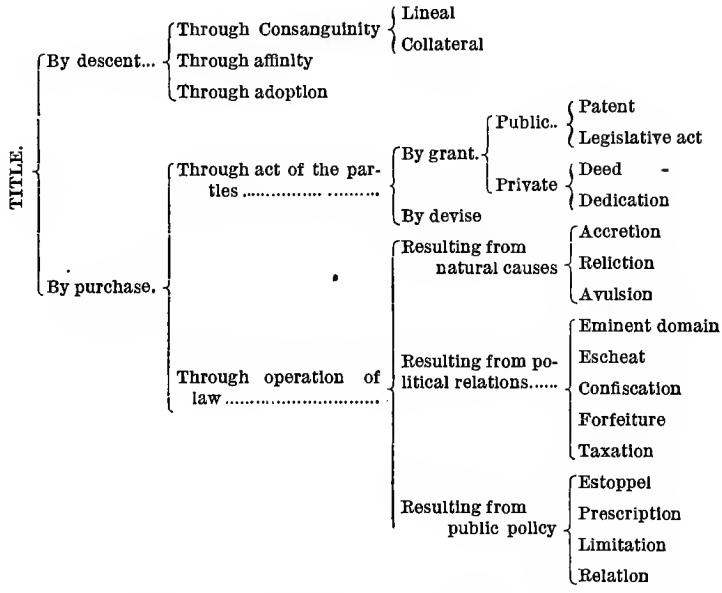
SHOWING, BY REFERENCE TO QUANTITY AND QUALITY, THE CLASSIFICATION AND DIVISION OF LEGAL ESTATES.



With respect to the authority for the assertion of rights in property we find that the law has broadly separated all forms of derivative title into two classes; (1) rights derived through inheritance, and (2) rights acquired other than by inheritance, or, by *descent* and by *purchase;* that in the former case title results by reason of some consanguineous relation, or through legal or juridical acts which create artificial consanguinity; that in the latter title results from some act of the parties, or through some operation of law. In Chapter IV an attempt has been made to show the nature and method of these various forms of title and the rules which govern in their devolution and the substance of that chapter has been gathered into the following table:

A CHART

SHOWING THE VARIOUS FORMS OF DEVOLUTION OF DERIVATIVE TITLE.



Of the various instruments of conveyance we find that there are two general forms, viz.; *deeds*, or instruments which take effect presently, and *wills*, or instruments which take effect at the death of the maker. That the former is a completed gift, even though possession be postponed, and hence irrevocable; that the latter is revocable in the lifetime of the donor, but until such revocation it may justly be regarded as a continuous act of gift up to the instant of death, when it becomes operative.

The author has prepared no chart of the operative instruments of conveyance but if the student will refer to the table of contents printed at the beginning of this volume, he will there find an orderly synopsis which will be of much assistance in making a review. Indeed this is true of the table

generally which has been so arranged as to furnish a fair and readily understood analysis of the entire book.

Secondary Reading.—The ambitious student who has mastered the fundamental principles as exhibited in the preceding pages, will naturally turn to other and more expanded works in order to obtain a knowledge of technical details. That classic of the law, "Blackstone's Commentaries," has been generally rejected by legal educators as unsuited to the methods now employed in the standard American Law School, yet it must be conceded that no legal education can be said to be complete without some knowledge of its contents. The student may now with profit commence the perusal of Blackstone's second book reading the same as legal history rather than as an exposition of law. From his knowledge of the present condition of this branch of jurisprudence he will be able to distinguish and reject the obsolete and inapplicable rules which characterized the law of Blackstone's day and be saved the necessity of having to unlearn much that could only be acquired by laborious effort if, as in the old days, the commentaries had been placed in his hands as a first book.

Should the student desire to further pursue the subject consecutively, or in course, he may, if time and inclination permit, take up the masterly treatise of Prof. Washburn. In that work, itself a legal classic, he will find discussed, with a depth of learning never surpassed and seldom equaled, all of the topics which in this primer are merely presented in brief epitome. There have been some important changes in the law since Washburn wrote and his terminology is some respects open to criticism, but no succeeding writer has yet displaced him and his work will long remain, a monument to his own genius and an authority on all the graver problems of the American law of real property.

There is no necessity, however, for again going over the field in course. The fundamentals of the law of real property are not intricate, however much so may be the specialized rules which are built upon them. In a tract of land a man possesses a certain degree of interest, which he holds in vir-

tue of some authority recognized by law; this interest he may transmit to another through some channel which the law provides. This is substantially the compass of the subject. If we are able to acquire clear conceptions of this fundamental outline at the outset of our studies the details will present but few difficulties. Assuming that such is the case the student may with profit direct his attention to specializations of the fundamental principles, for it is in these that he is to find the practical application of his legal knowledge when he comes to the actual work of the attorney. Conveyancing is an important branch; the law of Vendor and Purchaser will constantly present questions for solution; the Examination of Titles, a subject akin to that just mentioned, calls for much of the time and talent of the practitioner in this country where land has become to all intents and purposes an article of commerce; Ejectment, or the legal action for trying disputed titles, is a live topic and of special interest to every lawyer who desires to achieve eminence in his profession. Upon all of these subjects well written text-books can now be procured and to them the student may address himself. Should he desire to attain the highest degree of proficiency more minute subdivisions of our general subject may be selected. Special topics, like Covenants, with the scholarly text of the late Mr. Rawle as a guide, may be taken up. In like manner works on Trusts, Powers, and Limitations, where the subject in narrow compass is treated exhaustively, will be found valuable, not only as a means of extending the student's knowledge but as well for the mental discipline which their conscientious study will produce. These are, in one sense, the mathematics of the law. It would be improper, perhaps, to compile a selection of works on these subjects or to make invidious distinctions between authors, but the student should consult his instructor, or some reliable practitioner, before making his choice of works.

The history of the law, in some particulars, is as important as the law itself. Fortunately, there are now a number of excellent works upon this subject, the result of the comparatively

recent labors of English legal historians.[1] Researches among the archives of the English courts and departments of government have shed a flood of light upon many things that theretofore had been obscure or hidden and while conjecture must still, to some extent, supply the place of authentic data, we are yet enabled to arrive at far more accurate conclusions than were permitted to our predecessors of the last generation.

Finally the student's attention is directed to a volume rarely erudite and often incongruous, but which will be found of controlling efficacy in the solution of many of the questions presented in the practice of law. It is the Revised Statutes of his own state. This book may with profit be consulted in connection with the regular course study of real property or it may be used as an adjunct after the course has been completed. In any event it must be read — not merely referred to, but read, yet, in order that the reading may be productive of positive good results, such reading should in some way be systematized. In every state there are statutory provisions with respect to the descent of lands. When upon this subject in course it will be well to turn to the statute and observe the rules of descent with reference to persons and quantity. So in respect to wills, deeds, dedication, and the other topics usually treated of by the institutional writers. The English statutes of uses, frauds, etc., have been generally re-enacted in this country, while in many cases special statutes have been passed declaring, modifying or repealing the rules of the common law with respect to the acquisition and disposal of land and the creation, transfer and extinction of rights therein. All of these matters the student must know and his knowledge, to be of most worth, must be extracted from the original source of information.

[1] Notably the productions of Pollock and Maitland, particularly of the latter. Reeves History of English Law has long maintained a deservedly high reputation. Mr. Digby has prepared a well written and interesting volume on the history of real property law which contains much of value to American students.

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[The references are to the pages.]